Supreme Court, U.S.
FILED
JAN 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-298

In The

Supreme Court of the United States

October Term, 1985

JOHN F. CONNOLLY,

Petitioner,

v.

ANDREW K. BURT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUG. 22, 1985
CERTIORARI GRANTED DEC. 2, 1985

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RELEVANT DOCKET ENTRIES
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

DATE	PROCEEDINGS
1981	
10/20	COMPLAINT—pd Issued summons
12/11	MOTION to Quash Service of Process and to Dismiss this action for lack of subject Matter and in Personam Jurisdiction, Improper Venue, Insufficiency of Process and Service of Process and for Failure to State a Claim Upon which Relief can be granted . . . by Deft's. The Board of Regents of the University of Nebraska & John F. Connolly . . . COM
12/20	Memo in Support of Def Motion to Dismiss . . . COM Affidavit of Mr. Connolly
1982	
2/ 1	Brief in Opposition to Deft's. Motion to Dismiss . . . by Plft . . . COM
3/ 5	Deft's. Reply Brief in Support of Deft's. Motion to Dismiss . . . COM
6/28	MOTION to File Amended Claim . . . by Plft. AMENDED COMPLAINT . . . by Plft . . . COS (TENDERED)
7/ 1	MINUTE ORDER (SGF) . . . Plft's. Motion to Amend Complaint is GRANTED . . . The Clerk of Court is directed to file the tendered Amended Complaint, forthwith . . . COM . . . 7/2/82 AMENDED COMPLAINT . . . by Plft . . . COS
7/28	MOTION to Dismiss Plft's. Amended Complaint for Failure to State a claim upon which Relief can be Granted . . . by Deft's . . . COM Memorandum Brief In Support of Deft's. Mo-

tion to Dismiss Plft's. Amended Complaint . . . COM
Request for Oral Argument . . . by Deft's. . . . COM

8/ 5 Case is reassigned to Judge Moore . . . counsel notified.

8/ 6 MINUTE ORDER . . . def request for oral argument GRANTED . . . argument set 9/20/82 at 8:30 . . . COM . . . eod 8/6/82

8/30 Pltf's Rebuttal brief to deft's Motion to Dismiss for failure to state a claim under 42-USC-1983 . . . c.o.m.

9/14 Deft's Reply Brief to Pltf's Brief in Opposition to the Motion to Dismiss the Amended Complaint for Failure to State a Claim upon Which Relief can be Granted . . . com

9/20 HEARING (JPM) . . . ON deft's Motion to dismiss . . . Motion by Mr. Dyer for admission of Mr. Donnelly pro hac vic is granted . . . ORDERED: Pltf may file memorandum limited to response to cases cited by deft during this hearing within one week . . . MATTER TAKEN UNDER ADVISEMENT . . . eod 9/21/82

9/27 Pltf's Rebuttal brief to deft's oral argument . . . c.o.m.

10/ 1 MEMORANDUM OPINION AND ORDER (JPM) . . . Defts' motion to dismiss is granted and the complaint and cause of action are dismissed. Each party to pay own costs . . . c.o.m. eod 10/5/82.

10/29 NOTICE OF APPEAL, filed by Plaintiff, re Order of 10/1/82. C.O.S. Designation Conference set for Tues., 11/9/82 at 9:00 a.m. Transcript Order due 11/9/82. (fees not paid).

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DATE	FILINGS—PROCEEDINGS
11/ 9/82	CS.DKT Case docketed.
11/10/82	ROA.F Record on appeal filed. Vol. I (pleadings) (117pp). orig.
11/17/82	DKT. ST.F. Appellant's docketing statement filed, orig. & 6cc, c/s,MC
12/21/82	BR.F Appellant's brief filed, orig. + 9cc., c/s
2/25/83	BR.F Appellee's brief filed, orig. + 9cc., c/s
3/15/83	BR.F Appellant's reply brief filed, orig. + 9cc., c/s
1/14/84	ADD.AUTH.F Appellant's additional authority filed, orig & 9cc,c/s.
2/ 3/84	CS.ARG.SUBM—Case argued and submitted—Seth, Seymour, Anderson
4/24/84	ADD.AUTH.F. Appellant's second additional authority filed, orig & 9cc,c/s
3/20/85	OPN.F. Published, signed opinion filed. Seth, Seymour, Anderson. Writing Judge is Seymour JM.DISP. Judgment reversed. The cause is remanded. DIS.OPN.F. Published, dissenting opinion filed. Writing Judge is Seth.
4/18/85	P.REHRG.ENB.F/SUBM Appellee's petition for rehearing with suggestion for rehearing en banc filed, orig + 10cc,c/s
6/10/85	RMK.F Appellee's supplement to petition for rehearing in banc filed, orig. + 9cc., c/s
6/17/85	P.REHRG.ENB. DISP. Denied appellee's petition for rehearing en banc. En banc panel. Parties notified by mail.
*8/30/85	P.WRIT.CERT.F Appellee's, Connolly, petition for writ of certiorari filed 8/22/85. Supreme Court No. 85-298
12/ 5/85	P.WRIT.CERT.DISP. Supreme Court notice of granting of certiorari on 12/2/85.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. ———

ANDREW K. BURT,

Plaintiff,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA and JOHN F. CONNOLLY,

Defendants.

COMPLAINT

(Filed October 20, 1985)

Plaintiff, for his Complaint against Defendants, states alleges and avers as follows:

JURISDICTIONAL ALLEGATIONS

1. Plaintiff is a resident of the State of Colorado.

2. Defendants are residents of the State of Nebraska.

3. The amount in controversy herein, exclusive of interest and costs, exceeds the sum of $10,000.00, and the jurisdiction of this court is invoked pursuant to the provisions of 28 U.S.C. Section 1332.

4. Venue is proper in this district pursuant to the provisions of 28 U.S.C. Section 1391(a).

FIRST CLAIM FOR RELIEF

5. Plaintiff is a medical doctor, having received his medical training at the University of Nebraska Medical School.

6. Defendant Connolly, at all time relevant hereto, has been a Professor in and Chairman of the Department of Orthopedic Surgery And Rehabilitation of the University of Nebraska Medical School.

7. Defendant Board of Regents of the University of Nebraska ("Regents") is the employer of Defendant Connolly.

8. During his medical training at the University of Nebraska, Plaintiff successfully completed both the undergraduate medical program and a resident's program in orthopedic surgery. On or about June 30, 1977, Plaintiff was issued a certificate of residency in orthopedic surgery by the University of Nebraska Medical School, signed by Defendant Connolly.

9. On several occasions since completing his medical training and residency, Plaintiff has sought to obtain hospital staff privileges in the area of orthopedic surgery and otherwise practice his profession of orthopedic surgery in the State of Colorado.

10. The various hospitals contacted by Plaintiff have in turn contacted Defendant Connolly inquiring about Plaintiff's performance in the University of Nebraska Orthopedic Surgery Residency Program.

11. On each occasion when so contacted, Defendant Connolly, acting within the scope of his employment with the University of Nebraska and with the knowledge of the University, has stated orally and/or in writing that Plaintiff's performance in the Orthopedic Surgery Program was well below average, that as a result thereof Plaintiff has not been recommended for Board eligibility and that Plaintiff would not serve adequately in the field of

orthopedic surgery. Such statements were published in the State of Colorado.

12. The foregoing statements by Defendant Connolly were false when made and made with malice on the part of Defendant Connolly toward Plaintiff.

13. Such statements have directly harmed Plaintiff in his profession by lessening his reputation as a medical doctor among his peers and the public in general, and making it impossible for Plaintiff to practice his specialty of orthopedic surgery. Plaintiff has been denied hospital *staff privileges,* not only in the area of orthopedic surgery, but in emergency room treatment as well, specifically as a result of such statements.

14. As a result of being unable to practice his specialty or function as an emergency room physician, Plaintiff has suffered loss of remuneration, profits and business opportunity in the amount of at least $500,000.00.

15. Plaintiff additionally should be awarded punitive damages in the amount of $1,000,000.00 as a result of the malicious nature of Defendant Connolly's conduct.

WHEREFORE, Plaintiff prays the court for judgment in his behalf and against Defendants jointly and severally as follows:

A. General damages in the amount of at least $1,000,000.00.

B. Special damages in the amount of at least $500,000.00.

C. Punitive damages in the amount of at least $1,000,000.00. For his costs of this action.

D. Attorneys fees and such other and further relief as to the court may seem proper.

SECOND CLAIM FOR RELIEF

16. Plaintiff repeats and realleges Paragraph 1 through 13 of his First Claim for Relief.

17. At the time of his entry into the University of Nebraska Medical School, Plaintiff and Regents contracted that if Plaintiff successfully completed the undergraduate medical program and any subsequent specialty programs, Plaintiff would be qualified to practice medicine in such fields.

18. Despite having successfully completed such programs as stated previously, Defendants Connolly and Regents now take the position that Plaintiff is unqualified to practice his specialty of orthopedic surgery.

19. Such conduct on the part of Defendants amounts to breach of contract, for which Plaintiff has suffered actual damages of at least $500,000.00.

WHEREFORE, Plaintiff prays for judgment in his behalf and against Defendants jointly and severally in the amount of at least $500,000.00, for his costs of this action, attorneys fees and such other and further relief as to the court may seem proper.

THIRD CLAIM FOR RELIEF

20. Plaintiff repeats and realleges Paragraphs 1 through 13 of his First Claim for Relief.

21. The conduct of Defendants in causing the hospital to refuse to grant Plaintiff staff privileges in orthopedic surgery and emergency room treatment amounts to interference with contract or interference with prospective advantage.

22. Plaintiff has been directly damaged as a result of such interference in the amount of at least $500,00.00.

23. Defendants conduct in interferring with Plaintiff's contract or prospective advantage has been willful and wanton and punitive damages in the amount of at least $1,000,000.00, should be awarded therefore.

WHEREFORE, Plaintiff prays the court for judgment in his behalf and against Defendants jointly and severally in the amount of at least $500,000.00 for actual damages and $1,000,000.00 punitive damages, for his costs of this action, attorneys fees, and such other and further relief as to the court may seem proper.

FOURTH CLAIM FOR RELIEF

24. Plaintiff repeats and alleges Paragraph 1 through 13 of his First Claim for Relief.

25. Defendants conduct as stated amounts to outrageous conduct, which has directly damaged Plaintiff in the amount of at least $500,000.00.

26. Such conduct was willful and wanton and punitive damages in the amount of at least $1 000,000.00, should be awarded therefore.

WHEREFORE, Plaintiff prays the court for judgment in his behalf and against Defendants jointly and severally in the amount of at least $500,000.00 for actual damages and $1,000,000.00 punitive damages, for his costs

of this action, attorneys fees, and such other and further relief as to the court may seem proper.

Address of Plaintiff:

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Englewood, Colorado 80112

HANNON, STUTZ,
DYER & MILLER
By: /s/ Robert J. Dyer, III
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Telephone: 861-1200

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-1850

[Title omitted in printing]

MOTION TO QUASH SERVICE OF PROCESS AND TO DISMISS THIS ACTION FOR LACK OF SUBJECT MATTER AND IN PERSONAM JURISDICTION, IMPROPER VENUE, INSUFFICIENCY OF PROCESS AND SERVICE OF PROCESS AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

COME NOW the defendants, The Board of Regents of the University of Nebraska and John F. Connolly, specially appearing by and through their attorneys, Pryor, Carney and Johnson, a professional corporation, and hereby move this honorable court to quash the return of service of the Summons herein and to dismiss this action for lack of subject matter and in personam jurisdiction, lack of proper venue, insufficiency of process and service of process, and for failure to state a claim upon which relief can be granted, and AS GROUNDS THEREFOR, defendants state unto the court the following:

1. Plaintiff alleges that he is a resident and citizen of the State of Colorado and brings this action stating claims for defamation, breach of contract, interference with prospective advantage, and outrageous conduct.

2. The claims asserted by plaintiff arise from defendant Connolly's response to inquiries made by a Colorado hospital, with the consent, express or implied, of the plaintiff, concerning the plaintiff's performance as a resident in orthopedic surgery at the University of Nebraska Medical Center located in the City of Omaha, State of Nebraska.

3. The latter three claims for relief are derivative of the First Claim for Relief, sounding in defamation.

4. Defendant Connolly is sued only in his official capacity as an employee of the Board of Regents of the University of Nebraska.

5. The Board of Regents of the University of Nebraska is an agency of the State of Nebraska. *See, Catania v. University of Nebraska,* 204 Neb. 305, 282 N.W.2d 27 (1979).

6. The principal place of business of the University of Nebraska is located within the State of Nebraska.

7. Defendant Connolly is a citizen and resident of the State of Nebraska, at all pertinent times herein, served in the capacity as an employee of the University of Nebraska as Chairman of the Department of Orthopedic Surgery at the University of Nebraska medical center in Omaha, Nebraska.

8. No defendant in this case is licensed or authorized to do business within the State of Colorado, nor do any of them do business within the State of Colorado for jurisdictional purposes.

9. Neither the Board of Regents of the University of Nebraska nor Dr. Connolly own any real property situated within the State of Colorado, and neither defendant is engaged in the business of contracting to insure any person, property or risk residing or located within the State of Colorado.

10. Defendants maintain no office, place of business, teaching, or research facility within the State of Colorado.

11. With respect to the claims asserted by plaintiff, no defendant was ever actually physically present within the State of Colorado.

12. This action involves not a suit between citizens of different states, but a suit between a citizen of Colorado against the State of Nebraska which is not a citizen for purposes of diversity jurisdiction.

13. This is not a civil action in which jurisdiction is founded only on diversity of citizenship, and therefore 28 U.S.C. § 1391(a) does not confer proper venue.

14. There has been no commission of a tortious act within the State of Colorado by either defendant, and alternatively, even if this court should determine that the allegations of the Complaint are sufficient to show commission of a tortious act within this state by one or both defendants, there are not sufficient minimal contacts between defendant and this state to afford this court a sufficient basis to exercise its jurisdictional power over the subject matter of this case or the person of either defendant.

15. Plaintiff's attempt to obtain jurisdiction over these defendants violates due process in that neither defendant is present within the territory of this forum, has not committed a tortious act within this forum, has never been physically present in this state with respect to the claims stated, nor have performed any act enumerated in C.R.S. 1973 § 13-1-124, and defendants do not have sufficient contacts with the State of Colorado to allow this court to exercise its jurisdictional power over either of them consistent with constitutional limitations.

16. The Complaint fails to state a claim upon which relief can be granted for the reason that defendant is a Nebraska state agency and defendant Connolly is sued only in his capacity as an employee of this state agency, and plaintiff's claims are barred by the doctrine of sovereign immunity and plaintiff's failure to avail himself of available administrative remedies through the Nebraska Tort Claims Act. Furthermore, the defamation claim is barred, in whole or in part, by one-year limitation of actions. In both the State of Nebraska and Colorado, the remaining claims, being solely derivative thereof, are also barred.

17. Venue in this case is also improper under the doctrine of forum non conveniens.

18. Defendants incorporate by reference their memorandum brief and affidavits to be filed in support of this motion as if fully set forth herein.

19. Pursuant to Rule 12(b) of the Federal Rules of Civil Pdocedure, this action should be dismissed for lack of jurisdiction over the subject matter, lack of jurisdiction over the person of defendants, improper venue, insufficiency of process and service of process, and failure to state a claim upon which relief can be granted as will be more fully delineated in defendants' memorandum brief and affidavits.

WHEREFORE, defendants, The Board of Regents of the University of Nebraska and John F. Connolly, respectfully request this honorable court to enter its order quashing the return of service of process and dismissing the instant action for the reasons set forth above and to afford

defendants such other and further relief as the court deems appropriate under the circumstances.

Respectfully submitted,

PRYOR, CARNEY and JOHNSON
A Professional Corporation

By: /s/ Thomas L. Roberts
7503 Marin Drive, Suite 2D
Englewood, CO 80111

Attorneys for Defendants

[Certificate of Mailing omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-F-1850

[Title omitted in printing]

MEMORANDUM IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS

COME NOW the defendants, THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA and JOHN F. CONNOLLY, by and through their attorneys, PRYOR, CARNEY AND JOHNSON, a Professional Corporation, and respectfully submit the following Memorandum in support of their Motion to Dismiss.

I. PRELIMINARY STATEMENT

The present action involves claims asserted by the plaintiff, Andrew K. Burt, against The Board of Regents of the University of Nebraska ("Board of Regents") and John F. Connolly, M.D. ("Dr. Connolly").

Plaintiff claims that he pursued graduate medical training at the University of Nebraska as a resident in the field of orthopedic surgery, and that on June 30, 1977 he completed his residency program. [Plaintiff's Complaint, ¶ 8.] Since that time, plaintiff contends that he has applied for staff privileges at various hospitals in Colorado, which have, in turn, contacted the University of Nebraska regarding plaintiff's academic performance as an orthopedic resident. It is asserted that in response to these inquiries, Dr. Connolly, while acting in his official capacity as the Chairman of the Department of Orthopedics and Rehabilitation of the University of Nebraska College of Medicine, stated that plaintiff's performance was "well below average." [*Id.* at 11.] As a result, plaintiff contends, *inter*

alia, that he has been denied staff privileges at Colorado hospitals and that his reputation has been harmed. [*Id.* at 13.] Claims of defamation, breach of contract, interference with prospective advantage and outrageous conduct have been asserted against defendants.[1]

As will be discussed below, this Court lacks subject matter jurisdiction over plaintiff's claims, both because the requisite diversity of citizenship is not present and by operation of the Eleventh Amendment. Additionally, this Court may not, consistent with the due process guarantees of the Fourteenth Amendment, properly exercise *in personam* jurisdiction over defendants.

Accordingly, defendants respectfully submit that this Court should grant the present Motion, dismissing plaintiff's claims.

Alternatively, even if this Court should conclude that both subject matter and personal jurisdiction exist, this case should nevertheless be transferred to the District Court for the District of Nebraska pursuant to 28 U.S.C. § 1404(a).

---

[1]While it is, of course, true that the plaintiff's factual allegations must be accepted by this Court for the purpose of the present Motion, it is nonetheless apparent that the sole basis for plaintiff's claims is a letter written by Dr. Connolly to the Director of Medical Education at Presbyterian Hospital in Denver on October 20, 1980. A copy of this letter is attached to Dr. Connolly's Affidavit, which is appended as an exhibit hereto. Since a one-year statute of limitations governs libel and slander claims in both Colorado and Nebraska, C.R.S. 1973 § 13-80-101, Neb. Rev. Stat. 1943 § 25-208, and since plaintiff's Complaint was filed on October 20, 1981, the only potentially actionable letter of Dr. Connolly is the October 20, 1980 letter. The remaining Claims for Relief asserted by plaintiff will also be governed by a one-year statute, for these claims are merely derivative of the underlying defamation claim.

II. SUMMARY OF ARGUMENT

This Court lacks jurisdiction over the subject matter of this suit for the following reasons.

The plaintiff has brought suit against the Board of Regents, an agency of the State of Nebraska, and against Dr. Connolly in his capacity as Chairman of the Department of Orthopedic Surgery at the University of Nebraska. These defendants are not "citizens" within the meaning of 28 U.S.C. § 1332 and, therefore, no diversity jurisdiction exists. Since the allegations of plaintiff's Complaint do not involve any federal question or claim arising under federal statute or treaty or the federal Constitution, this Court lacks subject matter jurisdiction over the present controversy.

Furthermore, the Eleventh Amendment bars this Court from exercising jurisdiction over the Board of Regents and Dr. Connolly.

The Court lacks *in personam* jurisdiction over the defendants because no act was committed within the State of Colorado within the meaning of the Colorado long-arm statute. However, even assuming, *arguendo*, that service of process under the long-arm statute was proper, the defendants lack sufficient contacts with the State of Colorado to satisfy minimum due process requirements of the Fourteenth Amendment. Therefore, the Court must dismiss this action for lack of *in personam*-jurisdiction.

Alternatively, this Court should exercise its discretion and order a change of venue pursuant to 28 U.S.C. § 1404(a) because the State of Colorado is an inconvenient forum and justice will be better served by transferring this case to the State of Nebraska.

III. THE COURT HAS NO SUBJECT MATTER JURISDICTION OVER THIS ACTION

A. DIVERSITY OF CITIZENSHIP.

As pleaded, plaintiff asserts only nonfederal, common law causes of action. This case involves no federal question nor any claim for relief arising under any federal statute, treaty, or constitutional provision. If subject matter jurisdiction exists in this case, therefore, it must be found, if at all, pursuant to this Court's jurisdiction over controversies arising between citizens of different states.[2]

This is not such a case for the simple reason that neither a state, a state agency nor a state employee sued in his official capacity is considered a "citizen" for the purposes of diversity jurisdiction.

It is beyond dispute that a state is not a "citizen" within the meaning of 28 U.S.C. § 1332(a). *State Highway Comm. v. Utah Construction Co.*, 278 U.S. 194 (1929). This rule was first enunciated by the United States supreme Court as follows:

> A state is not a citizen. And, under the judiciary acts of the United States, it is well settled that a suit between a state and a citizen or a corporation of another state is not between citizens of different states; and that the Circuit Court of the United States has no jurisdiction of it, unless it arises under the Constitution, laws, or treaties of the United States.

---

[2]Indeed, in paragraph 3 of his Complaint, plaintiff specifically invokes the diversity jurisdiction of this Court pursuant to 28 U.S.C. § 1332.

Postal Telegraph Cable Co. v. State of Alabama, 155 U.S. 482, 487 (1894). *Accord, Moore v. County of Alameda*, 411 U.S. 693, 717 (1973).

Similarly, state agencies or officers thereof may not be considered citizens for the purpose of federal diversity jurisdiction. *See generally Annot.*, 6 A.L.R. Fed. 615 (1971). Thus, for example, in *Roberson v. Dale*, 464 F. Supp. 680 (M.D.N.C. 1979), plaintiff sued the University of North Carolina and the University of North Carolina at Chapel Hill, claiming that those institutions had, *inter alia*, breached an employment contract. The court, in dismissing plaintiff's claim for lack of subject matter jurisdiction, held that the Universities were "alter-egos" or agencies of the State of North Carolina and therefore not citizens for diversity purposes.

> It is well settled that a state is not a "citizen" within the meaning of 28 U.S.C. § 1332(a). It is also settled law that a federal court has no jurisdiction under 28 U.S.C. § 1332 to hear a case where the defendant is merely an alter-ego of a state.
>
> * * *
>
> It follows that when [defendant] hires a person to teach its students, and to fulfill the state's constitutional command, it is acting as agent of the General Assembly and not in its own monetary interest.
>
> The Court holds that [defendants] are "alter-egos" of the State of North Carolina and that the State is therefore the real defendant party in interest in this action. Diversity of citizenship between the parties is consequently lacking. The claim may be pursued only in state court.

464 F. Supp. at 686, 689 (citations and footnote omitted). Hence, neither a state agency, such as a state university, nor a state official sued in his official capacity is a "citi-

zen" under 28 U.S.C. § 1332(a). and diversity jurisdiction simply may not be predicated upon the joinder of such parties.

In the present case, the Board of Regents is a "state agency" and not a political division of the State of Nebraska. The Nebraska Supreme Court has so held in *Catania v. The University of Nebraska,* 282 N.W.2d 27 (Neb. 1979). The University of Nebraska is funded and operated through appropriations made by the Nebraska legislature, and any judgment as might enter against the University of Nebraska is ultimately payable by the State of Nebraska. Thus, the State of Nebraska is the real party in interest in this case.

Moreover, Dr. Connolly has been sued solely in his capacity as an employee of the Board of Regents, not in an individual capacity; therefore, his inclusion as a defendant in this case in no way affects the fact that the State of Nebraska is the defendant and real party in interest in this case.

In conclusion, then, there is no diversity of citizenship jurisdiction with respect to the claims presented here since they do not involve claims between citizens of different states, but rather, claims asserted by a citizen of Colorado against the sovereign State of Nebraska. In light of the absence of any claim pursuant to federal statute, treaty, or the federal Constitution, this Court lacks jurisdiction over the subject matter of this case, and has no alternative but to dismiss the instant suit.

This question is, of course, entirely dispositive of the instant Motion. Should the Court determine, as defendants respectfully request it should, from the Complaint,

affidavits, and legal authorities in this Memorandum that this is an action between a citizen of the State of Colorado and the State of Nebraska, the Court need go no further and must order immediate dismissal of this action.

B. THE ELEVENTH AMENDMENT.

The Eleventh Amendment to the Constitution of the United States circumscribes the jurisdiction of federal courts when a state has been sued. The Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Thus, a state is immune from suit in federal court brought by the citizen of another state unless it consents, either expressly or impliedly, to being sued. *Edelman v. Jordan,* 415 U.S. 651, 672 (1974). *See, e.g., Unified School Dist. No. 480 v. Epperson,* 583 F.2d 1118, 1121 (10th Cir. 1978). The Eleventh Amendment does not merely limit the right of a litigant to seek relief against a sovereign state; rather, it imposes an absolute jurisdictional bar to the joinder of a state as a party defendant. *Savage v. Com. of Pennsylvania,* 475 F. Supp. 524, 529 (E.D. Pa. 1979), *aff'd without opinion,* 620 F.2d 289 (1980).

Under the Eleventh Amendment, immunity to suit extends not only to states themselves, but also to state agencies. *Unified School Dist. No. 480 v. Epperson, supra; Allsup v. Knox,* 508 F. Supp 57, 61 (E.D. Ky. 1980).

A state university is ordinarily considered to be an agency of the state and is therefore imbued with Eleventh

Amendment immunity to suit in federal court. *See, e.g., In re Holoholo,* 512 F. Supp. 889, 894-95 (D. Hawaii 1981); *Vaughn v. Regents of University of California,* 504 F. Supp. 1349, 1352-53 (E.D. Ca. 1981); *An-Ti Chai v. Michigan Technological University,* 493 F. Supp. 1137, 1162-64 (W.D. Mich. 1980); *Zentgraf v. Texas A&M University,* 492 F. Supp. 265, 271 (S.D. Tex. 1980); *Jacobs v. College of William and Mary,* 495 F. Supp. 183, 189 (E.D. Va. 1980); *Board of Regents of University of Nebraska v. Dawes,* 370 F. Supp. 1190, 1191 (D. Neb. 1974); *Brennan v. University of Kansas,* 451 F.2d 1287, 1290 (10th Cir. 1971); *Williams v. Eaton,* 443 F.2d 422, 427-29 (10th Cir. 1971). Here, because the University of Nebraska and the Board of Regents are "under the direction" of the Nebraska legislature, Constitution of Nebraska, Art. VII, Section 10, because the Board of Regents of the University performs an essential governmental function, because the medical residency program at issue in this case was funded directly by the Nebraska legislature, Neb. Rev. Stat. 1943 § 71-5203, and because any judgment which might enter against the Board of Regents or the University of Nebraska is ultimately payable by the State of Nebraska [Affidavit of Richard Wood, attached hereto as Exhibit "A," at 22], it is readily apparent that the Board of Regents is an agency of the State of Nebraska. *See Cantania v. The University of Nebraska, supra.*

Accordingly, since the Board of Regents is an agency of the State of Nebraska and is therefore entitled to Eleventh Amendment immunity, and since the State of Nebraska has not waived sovereign immunity with respect to the claims raised by the plaintiff in the case at

bar,[3] this Court is barred from exercising jurisdiction over the Board of Regents under the Eleventh Amendment.

Similarly, state officers are cloaked with Eleventh Amendment immunity when they are sued in their official capacity.

> And when the action is essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.

Ford Motor Co. v. Treasury Department, 323 U.S. 459, 464 (1945). *Accord, Quern v. Jordan,* 440 U.S. 332, 314 n.17 (1979); *Jones v. Illinois Dept. of Rehabilitation Services,* 504 F. Supp. 1244, 1257 (N.D. Ill. 1981). Again, inasmuch as the claims asserted against Dr. Connolly relate solely to his official acts as an employee of the Board of Regents, plaintiff is barred from pursuing his claims in federal court by the Eleventh Amendment.

Thus, since the very basis of plaintiff's Complaint is the recovery of money damages from an agency and officer of the State of Nebraska, and since the State of Nebraska has not consented or otherwise waived its sovereign immunity with respect to the claims asserted

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[3]The Nebraska Tort Claims Act, Neb. Rev. Stat. 1943 §§ 81-8.209 *et seq.*, establishes, *inter alia,* that the State of Nebraska, and its officers, agents and employees, shall not be liable for claims based upon the performance of a "discretionary function" or claims arising out of " . . . libel, slander . . . or interference with contract rights." Neb. Rev. Stat. 1943 § 8-8.219(1)(a), (1) (d). Plaintiff's claims, all of which are premised upon the allegedly defamatory letter of Dr. Connolly, may not therefore be maintained against defendants under the terms of the Nebraska Tort Claims Act, and no waiver of sovereign immunity has occurred with respect to such claims.

here, this Court lacks jurisdiction altogether over the present case.

Defendants therefore submit that because this Court lacks jurisdiction because of the provisions of the Eleventh Amendment, this case must be dismissed.

IV. THE COURT SHOULD DECLINE TO EXERCISE PERSONAL JURISDICTION OVER DEFENDANTS

A. COLORADO LONG-ARM JURISDICTION.

Colorado's long-arm statute provides as follows:

> (1) Engaging in any act enumerated in this section by any person, whether or not a resident of the State of Colorado, either in person or by an agent, submits such person, and, if a natural person his personal representative to the jurisdiction of the courts of this state concerning any cause of action arising from:
>
> (a) The transaction of any business within this state;
>
> (b) *The commission of a tortious act within this state;*
>
> (c) The ownership, use, or possession of any real property situated in this state; or
>
> (d) Contracting to insure any person, property or risk residing or located within this state at any time of contracting.

C.R.S. (1973) §§ 13-1-124(1)(a)-(d) (emphasis added).

In enacting this statute, the General Assembly "intended to extend the jurisdiction of our courts to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution." *Safari Outfitters, Inc. v. Superior Court,* 167 Colo. 456,

448 P.2d 783, 784 (1969). Conversely, the General Assembly "did not intend that the long-arm statute be construed to permit jurisdiction to be asserted where to do so would violate due process of law." *Le Manufacture Francaise v. District Court*, — Colo. — , 620 P.2d 1040, 1044 (1980).

For purposes of the present Motion only, defendants will concede that the "tortious act" standard of the long-arm statute has been satisfied. It is generally held that in a defamation action. the place of publication is the place of the wrong. *St. Clair v. Righter*, 250 F. Supp. 148 (D.C. Va. 1966).[4]

However, the conclusion that the alleged conduct of defendants falls within the provisions of the Colorado long-arm statute is not alone dispositive of whether this Court may exercise *in personam* jurisdiction over defendants. Rather, the Court must, utilizing a two-part analysis, determine whether the application of the long-arm statute to defendants under the facts of this case comports with minimum due process requirements of the Fourteenth Amendment. *Le Manufacture Francaise v. District Court*, *supra*, 620 P.2d at 1044; *Knight v. District Court*, 162 Colo. 14, 424 P.2d 110, 113 (1967).

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[4]Although defendants concede that Colorado is the place of the alleged injury, defendants maintain that their response to a request from Denver Presbyterian Hospital, to which the plaintiff gave his actual and implied consent, does not constitute a publication and that, therefore, no "tortious act" has been committed. Defendants' statement that the plaintiff's "academic performance was well below average" is furthermore privileged.

B. DUE PROCESS CONSIDERATIONS.

The constitutional limitations of the state courts' power to exercise jurisdiction over a nonresident defendant have been definitely set forth in the following United States Supreme Court decisions. As stated in *International Shoe Co. v. State of Washington*, 226 U.S. 310 (1945), in order to subject a nonresident defendant to *in personam* jurisdiction within the territory of the forum, the defendant must:

> have certain minimal contacts with it such that the maintenance of the suit does not offend traditional notions 'of fair play and substantial justice.'

226 U.S. at 316. Since *International Shoe*, the jurisdictional reach of state courts consistently expanded. Thirteen years after that decision, however, the United States Supreme Court clearly pronounced that this expansive trend was not without limits:

> *But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts.* Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states. However minimal the burden of defending a foreign tribunal, a defendant may not be called upon to do so unless he has the minimal contacts with that state that are a prerequisite to its exercise of power over him.
>
> * * *
>
> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of a contact with a foreign state. The application of that rule will vary with the quality and nature of the defense activity. *It is essential in*

> *each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the foreign state, thus invoking the benefits and protections of its laws.*

Hanson v. Denckla, 357 U.S. 235, 251, 253 (1958) (citations omitted and emphasis added).

The United States Supreme Court has recently reiterated the principle that "the due process clause, acting as an instrument of interstate federalism, may sometimes act to divest the state of its power to render a valid judgment." *Worldwide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980). In *Worldwide Volkswagen Corp.,* the Court held that the petitioners, a nonresident retail dealer and his wholesale distributor, did not have sufficient minimum contacts to subject them to *in personam* jurisdiction in Oklahoma. The plaintiffs were driving through Oklahoma in an automobile purchased from the petitioners and were injured because of an alleged defect in the automobile. The Court stated that the fundamental inquiry should be whether "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being hailed into court there." 444 U.S. at 297. The Court reasoned as follows:

> The Due Process clause, by ensuring the "orderly administration of the laws," gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."

Id. (citation omitted). The Court held that insofar as the petitioners had not "delivered its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum states," petitioners have

no "contact, ties or relations" with the State of Oklahoma. *Id.* at 299.

Similarly, in *Premier Corp v. Newsom,* 620 F.2d 219 (10th Cir. 1980), the Court of Appeals upheld the trial court's ruling that the defendants did not have sufficient minimum contacts with the State of Colorado to warrant the exercise by the Federal District Court in Colorado of personal jurisdiction over either of the two defendants. In *Premier Corp.*, the defendants were physicians, both citizens of South Carolina, who had entered into a purchase and management contract in South Carolina with Premier Corp. whereby some of the cattle bought by defendants were kept and maintained by plaintiffs in Colorado.

The Court held that, for purposes of this transaction, the defendants had never been in Colorado, and further, that the fact that the defendants knew, or should have known, that their cattle were maintained in Colorado was not significant.

Citing *International Shoe Company v. Washington, supra,* and *Milliken v. Mayer,* 311 U.S. 457 (1940), the Court stated that even though services of process might comport with local state law, such service must also comport with the Fourteenth Amendment. The Court refused to exercise *in personam* jurisdiction over the defendants under Colorado's long-arm statute because plaintiff's unilateral activity pursuant to the contract did not give rise to sufficient minimum contacts. The Court stated:

> To hold to the contrary would in the instant case mean that the defendants could be required to defend

> in any one of 50 states where [plaintiff] chose to maintain the cattle. Such is not our idea of fair play.

Id., 620 F.2d at 223.

Thus, the exercise of *in personam* jurisdiction over a nonresident defendant is dependent upon the defendant's activities in or contacts with the form. Only if the defendant has *purposely* conducted activities within the forum of such a significant character that he may reasonably expect to be haled into the forum's courts are the minimum due process requirements of the Fourteenth Amendment satisfied. Unilateral activity of the plaintiff simply cannot create the basis for the exercise of *in personam* jurisdiction over a nonresident defendant.

Here, the defendants' *only* contact with the State of Colorado was a response to a *solicited* request to evaluate the plaintiff's performance and qualifications during the time the plaintiff was a resident in orthopedic surgery at the University of Nebraska College of Medicine. Neb. Rev. Stat. § 71-5202 establishes a medical education residency program for the purpose of training resident physicians. It is the obligation of the Board of Regents and of the Chairman of the Department, in fulfilling the legislative mandate to conduct a residency program and to provide recommendations and evaluations for those residents who have participated in the program and who have requested such references. Upon termination or completion of residency program, residents can be expected to seek employment in any one of the 50 states. For this Court to hold that there are sufficient contacts between the residents and the State of Colorado on the basis of the defendants' response to a solicted reference would mean that the defendants could be required to defend in

any one of the 50 states where any former student or resident has chosen to relocate.

Moreover, the affidavits of Dr. Connolly and Richard Wood, counsel for the University of Nebraska, attached hereto as Exhibits "A" and "B," indicate that the defendants have no contacts with the State of Colorado. The defendants own no real property in Colorado and conduct no business within the State of Colorado. It cannot be said that the defendants have purposely availed themselves of the privilege of conducting activities within the forum state. The response to a solicited inquiry is a single and isolated occurrence and does not evidence a course of action deliberately designed to move into the forum state.

Finally, the very nature of plaintiff's claims also militates against the exercise of *in personam* jurisdiction by this Court. ". . . First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity." *New York Times Co. v. Connor,* 365 F.2d 567, 572 (5th Cir. 1966). Since the totality of defendants' contacts with Colorado involve the written response to a solicited request regarding plaintiff's academic performance, the exercise of personal jurisdiction here would impermissibly encroach upon defendants' First Amendment rights.[5]

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[5]Defendants anticipate that plaintiff will point to a line of cases holding that the publication of allegedly defamatory material within the forum is a sufficient basis upon which to predi-

(Continued on following page)

Although service of process upon these defendants may technically have comported with the provisions of the Colorado long-arm statute, there are insufficient minimum contacts between the State of Colorado and these defendants to satisfy due process considerations under the Fourteenth Amendment. This is particularly true where the plaintiff's claims arise out of an alleged libel. Defendants' response to a solicited inquiry resulted in a privileged "publication," which publication constituted an isolated and single act. Defendants have the obligation under their mandate to conduct a residency program to write letters of verification and recommendation to former residents and their prospective employers. Such a letter could and would have been written on behalf of any resident and could have been sent to any state within the United States. Such conduct certainly does not rise to the level of "minimum contacts" required by the Fourteenth Amendment.

This Court should, therefore, decline to exercise *in personam* jurisdiction over the defendants because defendants have no "contact, ties or relations" with the State of Colorado. *Worldwide Volkswagen Co. v. Woodson, supra.*

(Continued from previous page)

cate the exercise of *in personam* jurisdiction. *See, e.g., Akbar v. New York Magazine,* 490 F. Supp. 60 (D.D.C. 1980); *Pfeiffer v. International Academy of Biomedic Medicine,* 521 F. Supp. 1331 (W.D. Mo. 1981). Significantly, these cases involve *commercial* media defendants. Inasmuch as defendants in the present case merely responded to a solicited request from a Colorado hospital, the foregoing cases are inapposite here. Certainly, where the defendants are not in the business of promoting or distributing publications within the forum, it cannot be maintained that an isolated written response to an inquiry amounts to purposeful activity within the forum.

V. ALTERNATIVELY, THIS COURT SHOULD TRANSFER THIS ACTION UNDER 28 U.S.C. § 1404(a) ON THE GROUNDS OF FORUM NON CONVENIENS

28 U.S.C. § 1404(a) allows for change of venue in order to prevent waste of time, energy and money and to protect the litigants, witnesses and the public against unnecessary inconvenience and expense. *Northwest Animal Hospital, Inc. v. Earnhardt*, 452 F. Supp 191 (W.D. Okla. 1977). Even if this Court finds that both subject matter and personal jurisdiction exist over plaintiff's claims, the Court should exercise its discretion and transfer this action to the District Court for the District of Nebraska.

The following factors have been considered by courts when ordering a change of venue: (1) the location of defendants' principal offices; (2) the residence of individual defendants; (3) the residence of potential witnesses; (4) the location of pertinent documents and records; and (5) the location where the challenged conduct was conceived, executed and performed. *Starnes v. McGuire*, 168 U.S. App. D.C. 4, 512 F.2d 918 (1974).

In the present action, the University of Nebraska has its principal and *only* offices in the State of Nebraska. Dr. Connolly in his capacity as Chairman of the Board of Orthopedic Surgery, has his sole residence within the State of Nebraska. The plaintiff completed his residency program at the University of Nebraska College of Medicine, and it is his academic performance during this period of time that is at issue. All witnesses, documents, and records which pertain to the plaintiff's residency program, to his performance and qualifications, and to the correspondence which these elicited, are located at the University of Nebraska in the State of Nebraska. The great majority

of potential witnesses, both for the plaintiff and for the defendants, reside in Nebraska.

Finally, the allegedly defamatory letter sent by Dr. Connolly in response to a request from Denver Presbyterian Hospital was drafted, written, typed and mailed within the State of Nebraska.

In view of the factors stated above, the defendants would be substantially inconvenienced unless this action is transferred to the District Court for the District of Nebraska. For these reasons, the Court should, under 28 U.S.C. § 1404(a), exercise its discretion and transfer this action to the Federal District Court in Nebraska.

———o———

CONCLUSION

For the reasons stated and upon the authorities cited above, the defendants respectfully request this Honorable Court to grant their Motion to Dismiss for Lack of Subject Matter an *In Personam* Jurisdiction or, in the alternative, to transfer this action to the District Court for the District of Nebraska under the provision of 28 U.S.C. § 1404a.

Respectfully submitted,

PRYOR, CARNEY and JOHNSON,
A Professional Corporation

By: /s/ Edward D. Bronfin #11170
for Thomas L. Roberts, #5304
Attorneys for Defendants
7503 Marin Drive
Marin III, Suite 2D
Englewood, Colorado 80111
(303) 771-6200

[Certificate of Mailing omitted in printing]

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-F-1850

[Title omitted in printing]

AFFIDAVIT

STATE OF NEBRASKA)
) SS.
COUNTY OF DOUGLAS)

COMES NOW the affiant, being first duly sworn, and states as follows:

1. My name is John F. Connolly, and I am a professor and Chairman of the Department of Orthopedic Surgery and Rehabilitation of the University of Nebraska College of Medicine. My business address is: Department of Orthopedic Surgery and Rehabilitation, University of Nebraska Medical Center, 42nd and Dewey Avenue, Omaha, Nebraska 68105.

2. As Chairman of the Department of Orthopedic Surgery, it is within the scope of my duties to respond to inquiries concerning the academic performance and proficiency of past and present residents in Orthopedic Surgery at the University of Nebraska College of Medicine.

3. I do not have present within the State of Colorado any registered agent for service of process.

4. I maintain no office or other place of business within the State of Colorado.

5. I maintain no listing in any local telephone or business directory within the State of Colorado.

6. I have no legal or equitable interest in, nor make use of any real or personal property situated within the State of Colorado.

7. I have never engaged in the business of insuring any person, property, or risk located within the State of Colorado.

8. I have never engaged in any educational research or recruiting in the State of Colorado.

9. I have never made a trip to the State of Colorado for any purpose relating to any transaction giving rise to this suit.

10. Marked Exhibit A, and attached hereto is a true copy of a letter dated October 14, 1980, from Presbyterian Denver Hospital, directed to and received by me in my capacity as the Chairman of the Department of Orthopedic Surgery and Rehabilitation of the University of Nebraska, which letter requested verification of Plaintiff's residency program and sought my opinion concerning Plaintiff's medical knowledge and related matters.

11. Marked Exhibit B, and attached hereto is a true copy of a letter dated October 21, 1980, which constituted my reply to the inquiry reported by Exhibit A.

12. Exhibit B was written, typed and placed in the United States Mail in the State of Nebraska.

13. Exhibit B was sent for the sole purpose of responding to Exhibit A, and Exhibit B was sent only in response to this solicited inquiry, and in the belief that the response would be held confidential.

14. Exhibit B represents my opinion and recommendation concerning the Plaintiff's academic performance

and qualification, and the contents thereof continue to be my opinion and recommendation.

/s/ John F. Connolly

[Subscription omitted in printing]

[EXHIBIT A to Affidavit of John F. Connolly]

Presbyterian Denver Hospital
a division of Presbyterian/Saint Luke's Medical Center
1719 East 19th Avenue, Denver, Colorado 80218
(303) 839-6000

October 14, 1980
John T. Connolly, M.D.
Program Director
Department of Orthopedics
University of Nebraska Medical Center
42nd and Dewey Avenue
Omaha, Nebraska 68105

Dear Dr. Connolly:

Dr. Andrew K. Burt has made application for staff membership at Vail Valley Community Hospital through Presbyterian Denver Hospital. He states that he had an orthopedic residency at the University of Nebraska. We would appreciate your confirming the above, as well as any other information you might have regarding his medical knowledge, technical proficiency, medical judgement, personal habits, morals, ethics, etc.

Your answer will be confidential.

Sincerely,

/s/ Michael A. Lubchenco, M.D.
Director of Medical Education

MAL:mfw

[EXHIBIT B to Affidavit of John F. Connolly]

THE UNIVERSITY OF NEBRASKA
MEDICAL CENTER
42ND AND DEWEY AVENUE
OMAHA, NEBRASKA 68105

October 21, 1980
Michael A. Lubchenco, M.D.
Director of Medical Education
Presbyterian Denver Hospital
1719 East 19th Avenue
Denver, Colorado 80218

RE: Andrew Kelly Burt, M.D.

Dear Doctor Lubchenco:

In reply to your inquiry about Doctor Burt, he did spend time here as an Orthopaedic Resident from 1974-1977. His performance was well below average and he has consequently not been recommended for Board eligibility. I think he might serve adequately in some field of medicine but not that of Orthopaedic Surgery.

Yours truly,
/s/ John F. Connolly, M.D.
Professor and Chairman

lat

[Immaterial letter head items omitted in printing]

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-F-1850

[Title omitted in printing]

AFFIDAVIT

COMES NOW the Affiant, being first duly sworn, and states as follows:

1. My name is Richard R. Wood, and I am licensed to practice law within the State of Nebraska and am the General Counsel for the Board of Regents of the University of Nebraska (hereinafter "Board"), one of the defendants in this action, and am authorized to speak on its behalf.

2. The Board of Regents of the University of Nebraska is an agency of the State of Nebraska (and not a political subdivision) created pursuant to the Constitution of the State of Nebraska, Article VII, Section 10, and operated pursuant to state statutes.

3. The Board is a state agency engaged in the business of governing the University of Nebraska, including the University of Nebraska Medical Center.

4. The Board is neither licensed nor registered to do business as a foreign corporation within the State of Colorado, conducts no business within the State of Colorado, and is qualified to do and doing business only within the State of Nebraska pursuant to the University Charter and the Nebraska State Constitution.

5. The Board does not have present within the State of Colorado any registered agent for service of process.

6. The Board has no directors, officers, representatives, nor any other type of agent present within the State of Colorado.

7. The Board maintains no office or other place of business within the State of Colorado.

8. The Board has no employees or members present within the State of Colorado.

9. The Board maintains no listing in any telephone or business directory within the State of Colorado.

10. The Board does not own or use any real property situated within the State of Colorado.

11. The Board has never engaged in the business of insuring any person, property, or risk located within the State of Colorado.

12. The Complaint filed by plaintiff alleges, among other things, that the defendant Board breached a contract with the plaintiff, which contract, if it existed, would have been entered into and performed solely within the State of Nebraska.

13. The Board is not engaged in any teaching, research, or other service functions within the State of Colorado.

14. The Board maintains no physical or other facilities within the State of Colorado.

15. The Board has not and does not purposely avail itself of the privilege of doing business within the State of Colorado.

16. No member of the Board has ever been present within the State of Colorado with respect to any of the

transactions giving rise to this suit nor for any other purpose related to the business of the Board.

17. The University of Nebraska is an agency of the State of Nebraska, and all tort claims asserted against the Board must be asserted pursuant to the Nebraska Tort Claims Act pursuant to Neb. Rev. Stat. 1943 §§ 81-8,209 et. seq., a copy of which is marked Exhibit A, attached hereto, and incorporated by reference as if fully set forth herein.

18. Actions for libel or slander are barred in Nebraska unless brought within one year after they accrue pursuant to Neb. Rev. Stat. 1943 § 25-208, a copy of which is marked Exhibit B, attached hereto, and incorporated by reference as if fully set forth herein.

19. Any contract claim against the Board, as a prerequisite to suit, must first be presented to the Director of the State Department of Administrative Services, pursuant to Neb. Rev. Stat. 1943 §§ 24-319, 77-2,406 and 77-2,407, which govern claims against the state in actions which the state or a state agency, including the University of Nebraska, is a party, and a copy of these statutes is marked Exhibit C, attached hereto, and incorporated by reference as if fully set forth herein.

20. The Board is immune from suit based upon claims of libel and slander or interference with contract rights by virtue of subsection (d) of Neb. Rev. Stat. 1943 § 81-8,219, a copy of which is included within Exhibit A, attached hereto, and incorporated by reference as if fully set forth herein.

21. Operation of the University of Nebraska is primarily financed through general fund appropriations by the Legislature of the State of Nebraska, and the Board

has no independent means or ability to respond in damages in a suit of this type.

22. Any judgment as might enter against the Board of Regents of the University of Nebraska would be payable from state tax revenues appropriated to the Board by the Nebraska Legislature.

23. At all pertinent times hereto, John F. Connolly, M.D., was the chairman and director of the Department of Orthopedic Surgery of the University of Nebraska Medical Center.

24. As part of his official duties, Dr. Connolly is required to respond to inquiries as to the academic performance and other characteristics of former medical students and residents at the University of Nebraska Medical Center.

FURTHER Affiant sayeth not.

/s/ Richard R. Wood
General Counsel to the Board
of Regents of the University
of Nebraska

[Subscription omitted in printing]

[Exhibits to the affidavit of Richard R. Wood, consisting of photocopies of Nebraska statutes, have been omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-F-1850

[Title omitted in printing]

BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff, Andrew K. Burt ("Dr. Burt"), by and through his attorneys, HANNON, STUTZ, DYER & MILLER, submits the following Brief in Opposition to Defendants' Motion to Dismiss:

I. *PRELIMINARY STATEMENT*

It is important to note at the outset that Dr. Burt's claims are against Defendant John F. Connolly ("Connolly") both in his individual capacity and as an employee of Defendant Board of Regents. Dr. Burt has alleged that the actions of Defendant Connolly were intentionally designed to injure the Plaintiff and were accompanied with malice.

Assuming arguendo, that this Court finds that this action may not be maintained against the Defendant Board of Regents, nothing has been raised by the Defendants to bar this action against Defendant Connolly individually. Clearly, in his individual capacity, Defendant Connolly is a citizen of the State of Nebraska, and this Court has jurisdiction pursuant to 28 U.S.C. 1332.

When a state official acts beyond his statutory authority, he loses his official standing and is not protected against suit in Federal Court. *Read v. National Equity Life Ins. Co.*, 114 F.2d 977 (10th Cir. 1940). Similarly, in *Waller v. Professional Insurance Corp.*, 299 F.2d 193 (5th Cir. 1963), a motion to dismiss an individual claim was de-

nied as premature when the complaint alleged acts beyond his authority.

Finally, Defendant Connolly may not allege sovereign immunity as a defense to his individual actions. Nebraska follows the general rule stated in *Prosser on Torts* (4th Ed.) § 132:

> "There is no immunity where the inferior officer does not act honestly and in good faith, but maliciously, or for an improper purpose."

The Nebraska Supreme Court adopted a similar rule in *Allen v. Miller*, 142 Neb. 469, 6 N.W. 2d 594 (1942), and followed it in *Koch v. Grimminger*, 192 Neb. 706, 223 N.W. 2d 833 (1974).

Thus, even if this court finds that this action may not continue against Defendant Board of Regents, Dr. Burt requests leave to amend his complaint to drop all claims but the individual action against Defendant Connolly.

II. *WHETHER THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA IS A CITIZEN OF NEBRASKA FOR THE PURPOSES OF DIVERSITY JURISDICTION?*

The first issue raised by the Defendants relative to diversity jurisdiction is whether the Defendant Board of Regents is a political subdivision or an agency of the State of Nebraska. If the Defendant Board is found to be a political subdivision, it is considered a citizen for the purposes of diversity jurisdiction, *Kansas Turnpike Authority v. Abramson*, 275 F.2d 711 (10th Cir. 1960). Thus, this action would be properly maintainable in federal court if the Defendant Board was found to be a political subdivision. If the Defendant Board is found to be an

agency of the State of Nebraska, there is a split in the circuits as to whether diversity lies.

A. Is the Board of Regents of the University of Nebraska a subdivision or an agency of the State of Nebraska?

Although the Supreme Court in Nebraska recently found that the Board of Regents was an agency of the state, *Catania v. University of Nebraska,* 204 Neb. 304, 282 N.W.2d 27 (1979), in determining that issue for diversity purposes, a federal court is not bound by state decisions but must make an independent assessment. *Peter Kiewit & Sons-Const. Co. v. South Dakota State Highway Comm.*, 289 F. Supp. 333 (D.S.C. 1967).

The annotation found at 6 A.L.R. Fed. 615 (1971) lists five factors which have been considered by the courts in determining whether a body is an agency for the purposes of diversity. First, may the body sue or be sued in its own name? *Lenoir v. Porters Creek Watershed Dist.*, 586 F.2d 1081 (6th Cir. 1976). If the body has the statutory authority to sue and be sued in its own name, it is more likely a subdivision than an agency.

In the case at bar, by statute, Neb. Rev. Rev. Stat. § 85-105, the Board of Regents has the power to sue and be sued.

The second factor considered in the annotation was whether the legislative enactment provided that the agency was to perform an "essential governmental function". *Dunnick v. Kansas St. Highway Comm.*, 21 F. Supp. 882 (D.C. Kan. 1937). Such language would indicate that the body is an agency rather than a subdivision. No such lan-

guage is present in the statutory scheme of the Defendant Board.

Another factor to be considered is whether the body has the power to hold property in its own name or whether the property is held in the name of the State. *Lenoir, supra.* In the case of the Defendant Board, § 85-105 also gives it the power to hold and dispose of property in its own name.

The fourth factor considered is whether the body has a corporate existence separate from the state. *Department of Health and Rehabilitation Services v. Davis,* 616 F.2d 828 (6th Cir. 1980). The existence of a separate corporate status tends to establish a subdivision rather than an agency. Here again, the statutory scheme provides that the Board of Regents is constituted as a body corporate.

The final factor considered by the annotation is the financial interests of the state. The Defendant Board is funded not only through appropriations from the state legislature, but also from donations, grants, and tuition and fees which it is required to collect. Thus, the only source of funds to pay a judgment in this case would not be the state's general fund.

Secondly, Neb. Rev. Stat. 1943 § 81-823 authorizes the state to obtain liability insurance. Upon information and belief, there is liability insurance which would cover this loss. Thus, the financial interests of the state should not be an important factor in this determination.

Given the list of factors considered by the courts in the past, it is clear that for diversity purposes the Defendant Board is a political subdivision of the State of

Nebraska, not an agency. As a subdivision, it is a citizen of that state, and this Court is properly vested with jurisdiction pursuant to 28 U.S.C. 1332. *Kansas Turnpike Auth., supra.*

B. If the Board of Regents is an agency of the State of Nebraska, is it a citizen of Nebraska for diversity purposes?

Even if this Court finds that the Defendant Board is an agency, not a subdivision, of the State of Nebraska, there is a split amongst the circuits as to whether an agency may be a citizen for diversity purposes. *Compare, Kirby Lumber Corp. v. Louisiana,* 293 F.2d 82 (5th Cir. 1961) and *State Highway Comm. v. Kansas City Bridge Co.,* 81 F.2d 689 (8th Cir. 1936).

The issue again appears to be who is the real party in interest. Since the Defendant Board has the power to collect fees and tuition, and has provided for liability insurance to cover this loss, it would appear to be the real party in interest. Thus, even if the Defendant Board if found to be an agency of the State of Nebraska, it still should be considered a citizen of that state for diversity purposes. *Missouri, Kansas & Topeka Railroad Co. v. Missouri Railroad & Warehouse Comm.,* 183 U.S. 53 (1901).

III. *WHETHER THE ELEVENTH AMENDMENT IS A BAR TO AN ACTION IN FEDERAL COURT AGAINST THE BOARD OF REGENTS OF THE UNIVERSITY OF NBRASKA?*

Defendants next argue that the eleventh amendment operates as a bar to a suit in federal court against the Defendant Board. First, if this Court determines that the Defendant Board is a subdivision rather than an agency, the eleventh amendment does not apply. In *Hopkins v.*

Clemson Agricultural College, 221 U.S. 636 (1911), the United States Supreme Court found that a state college was a subdivision of the state and that the eleventh amendment did not apply to political subdivisions.

Secondly, even if this Court finds that the Defendant Board is an agency of the state, the circuits are similarly split on whether such agencies share this immunity. *Compare, Hander v. San Jaucinta Jr. Col.,* 519 F.2d 273 (5th Cir. 1975) and *Walstad v. University of Minnesota Hospital,* 442 F.2d 634 (8th Cir. 1971). The Court in *Somi v. Board of Trustees of the Univ. of Tenn.,* 513 F.2d 347 (6th Cir. 1975) found that each agency must be considered on its own basis. In *Walstad,* the immunity was specifically reserved in the State constitution. In *Somi,* the court found that the immunity was waived by a provision providing that the Board could sue and be sued. Given the factors discussed above, it would again appear that the Defendant Board should be amenable to suit in federal court.

Thirdly, the State courts of Nebraska have consistently held that sovereign immunity is waived to the extent that there is liability insurance covering the loss. *Johnson v. Municipal Univ. of Omaha,* 184 Neb. 512, 169 N.W. 2d 286 (1969) and *Brown v. City of Omaha,* 183 Neb. 430, 160 N.W. 2d 805 (1968). Since there is insurance covering this loss, the state has waived its immunity to the extent of that insurance and has waived the bars of the eleventh amendment.

IV. *WHETHER THIS COURT HAS PERSONAL JURISDICTION OVER THESE DEFENDANTS UNDER THE COLORADO LONG-ARM STATUTE?*

Defendants contend that this Court lacks in personam jurisdiction over them because they have insufficient bus-

iness contacts within Colorado to come under Colorado's long-arm statute, § 13-1124, C.R.S. 1973. This statute provides:

> (1) Engaging in any act enumerated in this section . . . submits such person . . . to the jurisdiction of the courts of this state . . . :
>
> (a) The transaction of any business within this state;
>
> (b) The commission of a tortious act within this state;
>
> . . .

Defendants concede that the tortious act alleged occurred in Colorado, as it is generally held that the place of publication is the place of the wrong. *St. Clair v. Righter*, 250 F. Supp. 148 (D.C. Va. 1966). Defendants contend, however, that in order to come under the statute, Plaintiff must establish both that a tort was committed in Colorado and that the Defendants did business in Colorado.

This is not what the statute says, nor is it the interpretation given the statute by the courts. In *People ex rel. Jeffers v. Gibson*, 181 Colo. 9, 508 P.2d 374 (1975), the Colorado Supreme Court found:

> "For jurisdiction to attach under the statute, there must be *either* a cause of action arising out of the commission of a tortious act in Colorado *or* the transaction of any business within this state."
> 508 P.2d at 376 (emphasis added).

Similarly, the Court in *Texas Flyers, Inc. v. District Court*, 180 Colo. 432, 506 P.2d 367 (1973), adopted the rule from other jurisdictions that when a nonresident commits a tort, no showing of continuous activity is required and jurisdiction is sustained by the commission of a single tort. This statute and interpretation have been upheld

in federal court., *Zerr v. Norwood,* 250 F. Supp. 1021 (D. Colo. 1966).

The cases cited and relied upon by these Defendants relate to products liability cases where there is an issue as to whether the tort took place. Thus, in *Luchina v. Futura, Inc.,* 260 F. Supp. 252 (D. Colo. 1966) the court required minimum contacts when the tortious act, the design of the product, occurred outside of Colorado, but the injury occurred in Colorado. In the case at bar, however, the Defendants have conceded that the tortious act occurred in Colorado.

Thus, the commission of the tort by Defendant Connolly within Colorado is sufficient to give this court jurisdiction under the long-arm statute.

Secondly, even if a requirement of minimal contacts is read into subsection (a) of the long-arm statute, those requirements have been met in this case. The leading case of *Hanson v. Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958) cited at length in Defendants' Brief has been interpreted by the Supreme Court to mean "that the defendant must have taken voluntary action calculated to have an effect in the forum state." *Rosenblatt v. American Cyanamid Company,* 86 S.Ct. 1 (1965).

In the case at bar, it is alleged that Defendant Connolly acted maliciously and intended his actions to have a result in Colorado. Such actions did have the desired result in Colorado as Dr. Burt was denied hospital privileges. Thus, this Court has personal jurisdiction over these Defendants.

V. WHETHER THERE ARE SUFFICIENT GROUNDS TO TRANSFER THIS ACTION TO THE DISTRICT COURT FOR THE DISTRICT OF NEBRASKA?

Defendants finally argue that this action should be transferred to the District Court for the District of Nebraska pursuant to 28 U.S.C. § 1404(a) on the grounds of forum non conveniens. First, the Plaintiff's choice of venue is given substantial weight. *Galconda Mining Corp. v. Herlands,* 365 F.2d 856 (2d Cir. 1966). The burden of proof for such a motion is on the defendant. *Time, Inc. v. Mammy,* 366 F.2d 690 (5th Cir. 1966).

While Dr. Burt does not deny that witnesses from Nebraska may have to be called, witnesses from Colorado will also be necessary. The publication of the statements were made in Colorado. Witnesses to testify as to the effect of those statements and to the damages that Dr. Burt received because of that publication are all in Colorado.

Thus, there are clearly witnesses both in Colorado and in Nebraska who will be required to testify. The witnesses in Nebraska are all employees of the Defendant Board, while the witnesses in Colorado are independent of any of the parties. Thus, there is insufficient grounds for transferring this action under 28 U.S.C. and this court should deny Defendants' Motion.

VI. CONCLUSION

Plaintiff Andrew K. Burt, respectfully requests this court to deny Defendants' Motion to Dismiss and their Motion to Change Venue, or in the alternative, for leave

to file an amended complaint naming John F. Connolly in his individual capacity as the sole Defendant.

Respectfully submitted,

HANNON, STUTZ, DYER & MILLER

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[Certificate ot Mailing omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-F-1850

[Title omitted in printing]

DEFENDANTS REPLY BRIEF
IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS

COME NOW the defendants, The Board of Regents of The University of Nebraska and John F. Connolly, by their attorneys, Pryor, Carney and Johnson, a Professional Corporation, and respectfully submit the following Reply Brief in Support of Defendants' Motion to Dismiss.

I. PRELIMINARY STATEMENT

The present action involves claims of defamation, breach of contract, interference with prospective advantage and outrageous conduct asserted by plaintiff against defendants The Board of Regents of the University of Nebraska ("Board of Regents") and John F. Connolly, M.D. ("Dr. Connolly"), the Chairman of the Department Orthopedics and Rehabilitation at the University of Nebraska College of Medicine.

Plaintiff asserts that in response to inquiries made by various Colorado hospitals regarding his academic performance during an orthopedic residency at the University of Nebraska Medical School, Dr. Connolly replied in writing that plaintiff's performance was "well below average." Allegedly as a result of Dr. Connolly's evalution, plaintiff claims that he has been denied staff privileges at Colorado hospitals and that his reputation has been harmed.

In response to defendants' arguments that this Court lacks subject matter jurisdiction over The Board of Regents and Dr. Connolly, plaintiff now contends that the Board was a "political subdivision" of the State of Nebraska and that Dr. Connolly, in responding to the written inquiries, was apparently acting solely in his individual capacity. As will be discussed below, both contentions lack merit. Additionally, plaintiff's assertion that the mere commission of a tortious act within this state is enough, standing alone, to justify the invocation of long-arm jurisdiction is plainly eroneous. Finally, since the preponderance of all evidence and witnesses in this case are in Nebraska, this Court should transfer the action to the District Court for the District of Nebraska in the event that the Court concludes that jurisdiction exists over plaintiff's claims and the defendants.

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER DEFENDANTS BOTH UNDER 28 USC § 1332 AND THE ELEVENTH AMENDMENT

A. Dr. Connolly.

In his Brief in Opposition to the present Motion, plaintiff boldly asserts that subject matter jurisdiction exists with respect to claims asserted against Dr. Connolly pursuant to 28 U.S.C. § 1332 because Dr. Connolly acted in his individual capacity.

Interestingly, aside from the assertion itself, plaintiff has alleged no facts which, even construed most favorably to the plaintiff, which state a claim against Dr. Connolly in his individual capacity. Rather, plaintiff has alleged:

> On each occasion when so contacted, Defendant Connolly *acting within the scope of his employment with*

> *The University of Nebraska* and with the knowledge of the University, has stated orally and/or in writing that plaintiff's performance in the Orthopedic Surgery Program was well below average . . .

Plaintiff's Complaint, ¶ 11 (emphasis added). The very allegations of plaintiff's complaint thus purport to state claims against Dr. Connolly *only* insofar as he was acting as an employee of or agent for the University of Nebraska.

Additionally, the uncontroverted facts of record establish that it was within the scope of Dr. Connolly's official duties as the chairman of the Orthopedics Department "to respond to inquiries concerning the academic performance and proficiency of past and present residents . . ." [Affidavit of Dr. Connolly, at 2; Affidavit of Richard W. Wood, at 24].

Hence, both plaintiff's own allegations and the undisputed affidavit facts conclusively establish that at the times relevant to this suit, Dr. Connolly was acting solely in his official capacity as an agent for the University of Nebraska Medical School.

It is settled that both for purposes of diversity of citizenship under 28 U.S.C. § 1332 and the Eleventh Amendment, a state officer sued in his official capacity is simply an "alter-ego" of the State. The joinder of such an official can, therefore, neither create diversity of citizenship nor overcome the strictures of the Eleventh Amendment.

In *Vaughn v. Regents of University of California*, 504 F. Supp. 1349 (E.D.Cal. 1981), for example, plaintiff asserted civil rights claims against the Board of Regents of the University of California at Davis and 19 employees

of the University. The Court held that the mere joinder of the individual defendants could not bypass or overcome the effect of the Eleventh Amendment.

> The Court must thus determine whether the entity sued herein, the Regents, is such an agency of the State of California that the State is in fact the real party in interest. *If the . . . damage claims against the Regents are barred by the Eleventh Amendment, those same claims against the employees of the University acting in their official capacities are likewise barred.*

504 F. Supp. at 1352 (citation omitted). *Accord, Ford Motor Co. v. Treasury Dept.*, 323 U.S. 459, 464 (1945); *Quern v. Jordan*, 440 U.S. 332, 345 n.17 (1979).

Similarly, a state officer or employee sued in his official capacity is, like the state or a state agency, not deemed a "citizen" for diversity purposes. "Where, as here, a state officer is sued merely as the representative or the 'arm or alter ego' of the State, for diversity purposes the action is treated as one against the State." *National Market Reports, Inc. v. Brown*, 443 F. Supp. 1301, 1305 (S.D.W.V. 1978).

In the present case, since the plaintiff's allegations and uncontroverted facts establish that Dr. Connolly was, at all relevant times, acting solely within his official capacity and as a representative of the University of Nebraska, he must, accordingly, be deemed to be merely an alter-ego of the State of Nebraska.[1] If, therefore, the

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[1]Apparently, the sole basis for plaintiff's contention that Dr. Connolly was acting in his individual capacity is the fact

(Continued on following page)

State of Nebraska and Board of Regents are immune from suit in this Court under either § 1332 or the Eleventh Amendment, such immunity necessarily extends to Dr. Connolly.

B. The Board of Regents.

Plaintiff, in an effort to label the Board of Regents a "political subdivision" of the State of Nebraska, relates a five-part test supposedly dispositive of the question. However, plaintiff has overlooked the particularly significant facts here.

It is beyond cavil that a state and state agency are *not* citizens within the meaning of 28 U.S.C. § 1332. *Moor v. County of Alameda*, 411 U.S. 693, 717 (1973). The determination of whether a state organization is a state agency depends *primarily* on the state's ultimate liability for the organization:

> In making this determination, the courts have considered a variety of factors: ability to sue and be

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(Continued from previous page)

that Dr. Connolly himself wrote and signed the allegedly defamatory letters. If Dr. Connolly had, in the privacy of his own home and on his own initiative, independently and without prior solicitation, sent letters to all hospitals in Colorado questioning plaintiff's professional abilities or credentials, then arguably he would have been acting in his individual capacty. However, such is clearly not the case here. Dr. Connolly responded to letters written to the University of Nebraska and on behalf of the University. Of course, since the University can only act through its agents, the fact that Dr. Connolly physically signed the letters is plainly insufficient to establish that he was acting in his individual capacity. Plaintiff's assertion that Dr. Connolly somehow acted "beyond his statutory authority," [Plaintiff's Brief, at 1], is unsupported by any facts or case authority.

> sued, lack of express authority to sue, performance by the entity of an "essential governmental function", power to take property in the name of the State, power to take property in its own name, corporate status, lack of corporate status, financial interest of the State, and absence of financial interest of the State.
>
> Of these factors "ultimate State liability" is the most determinative. Such ultimate liability would rest primarily upon two factors: the degree to which the organization is financially dependent on the State and the extent to which the organization performs a State obligation or function.

George R. Whitten, Jr., Inc. v. State Univ. Const. Fund, 493 F.2d 177, 179-80 (1st Cir. 1974) (footnotes omitted).

Thus, in *Ronwin v. Shapiro,* 657 F.2d 1071 (9th Cir. 1981), plaintiff sued, *inter alia,* the Board of Regents of the University of Arizona based upon the publication of an allegedly defamatory law review article. With little difficulty, the Ninth Circuit held that plaintiff's claim against the Board was barred under both § 1332 and the Eleventh Amendment, because the State of Arizona was the real party in interest and ultimately liable for any judgment which might enter.

> Although a number of factors may be considered, a crucial question in determining whether the suit should be regarded as one against the state is whether the named defendant has such independent status that a judgment against the defendant would not impact the state treasury.
>
> * * *
>
> . . . There is no evidence that the Board, acting in its corporate capacity, could satisfy a libel judgment in any way other than by turning to the state of Arizona. Consequently, we conclude that the Board of

> Regents is protected by the eleventh amendment, and, further, that *the Board is not a "citizen" within the meaning of 28 U.S.C. § 1332.*

657 F.2d at 1073 (emphasis added).

Moreover, as discussed in defendant's original brief, because a State University or Board of Regents fulfills the governmental function of education, neither may be considered a citizen under § 1332. *Roberson v. Dale,* 464 F. Supp. 680, 686, 689 (M.D.N.C. 1979).

Plaintiff, relying on generalized and vastly oversimplified principles, has simply chosen not to address the effect or impact of the above cases.

In the case at bar, it is undisputed that the University of Nebraska Medical School and Board of Regents were funded primarily through appropriations made by the Nebraska legislature [Affidavit of Richard R. Wood, at 21], and that any judgment which may enter against the Board of Regents would be payable from state funds [*id.*, at 22]. Additionally, "the Regents performs the essential governmental function of providing the citizens of the State of [Nebraska] with a higher education." *Vaughn v. Regents of University of California, supra,* 504 F. Supp. at 1353. Indeed, even the Nebraska Supreme Court has held that the Board of Regents is a state agency. *Catania v. The University of Nebraska,* 282 N.W.2d 27 (Neb. 1979).

Consequently, based upon the facts of record, it is plain that the Board of Regents is a state agency and may not, therefore, be deemed a citizen for diversity purposes under § 1332.

Similarly, the same facts establish that the Board of Regents is merely a alter-ego of the State and thus entitled to Eleventh Amendment immunity from suit in Federal Court. *Ronwin v. Shapiro, supra; Vaughn v. Regents of University of California, supra.* Plaintiff's claim that the State of Nebraska or the Board of Regents have waived their Eleventh Amendment immunity with respect to the claims asserted herein is simply unfounded. *See* Neb. Rev. Stat. 1943 § 81-8,219(1)(d).

Hence, in light of plaintiff's inability to come forward with any case law factually similar to the present case, and in view of the undisputed facts and overwhelming authority established by defendants, this Court should dismiss the present case both for lack of diversity of citizenship under 28 U.S.C. § 1332 and on account of the Eleventh Amendment.

III. THIS COURT SHOULD DECLINE TO EXERCISE PERSONAL JURISDICTION OVER DEFENDANTS UNDER THE COLORADO LONG-ARM STATUTE

Plaintiff maintains that long-arm jurisdiction over a nonresident defendant may be invoked merely if the defendant's alleged acts come within the terms of the Colorado long-arm statute. This position is plainly erroneous.

In *Le Manufacture Francaise v. District Court,* — Colo. — , 620 P.2d 1040 (1980), the Colorado Supreme Court held that the exercise of *in personam* jurisdiction over a non-resident defendant may not be predicated *simply* on the commission of a tortious act within the State. Rather, once that standard is satisfied, it must further be determined whether the exercise of personal jurisdic-

tion over the defendant comports with due process guarantees of the Fourteenth Amendment. "Therefore, the 'tortious act' standard of the long-arm statute has been satisfied *if* such a construction is consistent with due process of law." 620 P.2d at 1044 (emphasis added). A two-part analysis is therefore necessary.

As discussed in defendants original brief, even if it is assumed, *arguendo,* that defendants come within the literal wording of the Colorado long-arm statute, the defendants here have literally no contacts of any nature with the State of Colorado. Defendants have in no way availed themselves of doing business in Colorado, and certainly should not have foreseen that the mere act of mailing a letter to a Colorado hospital, in response to a solicited inquiry, would be enough to hale them before a Colorado court.

To accept plaintiff's argument would subject every user of the United States mails (and, by analogy, patrons of private mail carriers and even one who merely places a long distance phone call) to personal jurisdiction in courts of every jurisdiction throughout the United States. While the use of the mails may, if tied together with other activity, perhaps form the basis for the exercise of long-arm jurisdiction, it simply may not be maintained that the mere act of dropping a letter into a mailbox in Nebraska in response to a solicited inquiry is, consistent with traditional notions of fair play and justice, enough to establish long-arm jurisdiction. *Compare Kulko v. California Superior Court,* 436 U.S. 84 (1978) [Petitioner's isolated act of purchasing a one-way plane ticket for his child and sending her to California to live with her mother was not enough to justify the invocation of long-arm jurisdiction].

Thus, in the event that this Court concludes that subject matter jurisdiction exists over plaintiff's claims, defendants respectfully submit that the Court should nevertheless decline to exercise personal jurisdiction over these defendants.

IV. FORUM NON CONVENIENS

Finally, even if this Court should decline to dismiss the present action altogether, it is apparent that the case should be transferred to the District Court for the District of Nebraska pursuant to 28 U.S.C. § 1404(a).

While witnesses from Colorado may admittedly be called by plaintiff to testify at trial, it remains undisputed that the preponderance of witnesses and evidence are in Nebraska. Particularly since the plaintiff's orthopedic residency was performed in Nebraska, it is appropriate for this case to be tried in that state. Plaintiff has simply adduced no significant or compelling considerations which would militate against a change of venue to the District Court in Nebraska.

V. LIABILITY INSURANCE HAS NO BEARING ON THE ISSUES RAISED BY DEFENDANTS' MOTION TO DISMISS

By the Court's Order of February 9, 1982, defendants were directed to answer two interrogatories served by plaintiffs on defendants concerning whether the Board of Regents of the University of Nebraska has liability insurance coverage available to it which might pertain to any judgment as might enter in this case on or before February 19, 1982. This date, at the request of defendants, was extended to February 24, 1982. A copy of defendants' An-

swers to Interrogatories and a Verification signed by Richard R. Wood, general counsel to the University of Nebraska, are attached to this Brief.

Defendants have not received any supplemental brief from the plaintiff concerning what impact, if any, this information may have on the claims raised by defendants in their Motion to Dismiss.

Defendants contend, however, that since the Board of Regents of the University of Nebraska has no liability insurance which would cover any judgment in this case up to the amount of $500,000.00 that the State of Nebraska is clearly the real party in interest in this case and that the case should be dismissed as defendants argued in their initial brief, for lack of diversity jurisdiction, due to the bar of the Eleventh Amendment and sovereign immunity. Unlike the Governmental Immunity Act in effect within the State of Colorado, the existence of liability insurance does not cause any automatic waiver of immunity. The Nebraska statute which relates to situations in which liability insurance may be available to cover claims against the State merely provides as follows:

> Whenever a claim or suit against the State is covered by liability insurance, the provisions of the liability insurance policy on defense and settlement shall be applicable notwithstanding any inconsistent provisions of this Act. The Attorney General and the State Claims Board shall cooperate with the insurance company.

Neb. Rev. Stat. 1943 § 81-8,231. This provision does not waive governmental immunity or claims as to which insurance coverage may be available but merely provides that policy provisions concerning the carrier's right to

handle the defense and settlement of such cases shall be governed by the policy of insurance and does not abrogate sovereign immunity otherwise available to the State of Nebraska.

Furthermore, the Board of Regents has no insurance with respect to any claim for which judgment might enter up to the amount of $500,000.00, and thus satisfaction of any judgment up to that amount must come from State funds.

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CONCLUSION

Defendants therefore respectfully submit that this Court should dismiss the present case for lack of subject matter and/or personal jurisdiction. In the alternative, defendants request that the case be transferred to the appropriate forum in Nebraska.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-F-1850

[Title omitted in printing]

AMENDED COMPLAINT

Plaintiff, Andrew K. Burt, by and through his attorneys, Hannon, Stutz, Dyer & Miller, amends his previously filed Complaint as follows:

JURISDICTIONAL ALLEGATIONS

1. Plaintiff repeats and realleges Paragraphs 1 through 4 of his Complaint as though fully set forth herein.

2. This Amended Claim is brought pursuant to 42 United States Code, Section 1983. Jurisdiction is vested in this court pursuant to 28 U.S.C., Section 1343.

3. Defendant, Board of Regents of the University of Nebraska, is sued both as a political subdivision and an agency of the State of Nebraska. At all times relevant to this Amended Complaint the Defendant, Board of Regents, was acting pursuant to a grant of authority and under color of the authority of the State of Nebraska.

4. Defendant, John F. Connolly, is sued both in his individual capacity and as an agent of the Board of Regents of the University of Nebraska. At all times relevant to this Complaint, Defendant, Connolly was acting under color of authority of the State of Nebraska.

5. The Plaintiff invokes the ancillary and/or pendant jurisdiction of this court to hear and rule upon all claims related to the Amended Counterclaim.

AMENDED CLAIM FOR RELIEF

1. Plaintiff repeats and realleges Paragraphs 5 through 13 of his Complaint as though fully set forth herein.

2. On or about June 30, 1977, Defendants, Board of Regents of the University of Nebraska and Connolly, both acting by statute, regulation, and custom, under color of law of the State of Nebraska, issued to Plaintiff a Certificate of Residency in Orthopedic Surgery, thus creating a reasonable entitlement on the part of Plaintiff that he could practice his chosen profession free from unreasonable interference by the government.

3. The aforementioned entitlement, that of practicing orthopedic surgery as a medical doctor, is an interest recognized by State law in both the states of Colorado and Nebraska. In each state said license may not be revoked without the due process requirement of a hearing guaranteed to the individual by the 14th Amendment to the United States Constitution.

4. Plaintiff had a legitimate property interest in his Certificate of Residency in Orthopedic Surgery, guaranteed to him by the 14th Amendment to the United States Constitution. Said Certificate of Residency represents his lawful, legitimate and licensed means of making a living.

5. Plaintiff had a legitimate liberty interest in his Certificate of Residency guaranteed to him by the 14th Amendment to the United States Constitution in that said Certificate gave him the freedom to move about the country and practice his occupation free from unreasonable government interference.

6. The actions of Defendants, Connolly and the Board of Regents of the State of Nebraska, acting under color of State Law, amounted to a taking of Plaintiff's license to practice orthopedic surgery; in that Connolly's statements, previously referenced in allegation 11 of Plaintiff's original Complaint, made it impossible, in practical terms, for Plaintiff to practice his profession of orthopedic surgery.

7. The actions of Defendants, Connolly and Board of Regents, amounted to a defacto taking and revoking of Plaintiff's license to practice orthopedic surgery; thus violating Plaintiff's right to procedural due process guaranteed to him by the 14th Amendment to the United States Constitution.

8. The actions of Defendants, Connolly and Board of Regents, seriously injured and damaged the Plaintiff's right to liberty and property guaranted to him by the 14th Amendment to the United States Constitution.

9. As a result of Defendants' actions, Plaintiff is unable to practice his specialty or function as an emergency room physician, Plaintiff has suffered loss of remuneration, profits and business opportunity in the amount of at least $500,000.00.

10. Plaintiff additionally should be awarded punitive damages in the amount of $1,000,000.00 as a result of the malicious nature of both Defendants' conduct.

11. Plaintiff, by statute, is entitled to attorneys' fees.

WHEREFORE, Plaintiff prays the Court for judgment in his behalf and against Defendants jointly and severally as follows:

a. General damages in the amount of at least $1,000,000.00.

b. Special damages in the amount of a least $500,000.00.

c. Punitive damages in the amount of at least $1,000.000.00.

d. Reasonable attorneys' fees as determined by the Court.

e. Costs, disbursements and such other relief as to the Court may seem proper.

Date: June 28, 1982

Respectfully submitted,

HANNON, STUTZ, DYER
& MILLER

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-JM-1850

[Title omitted in printing]

PLAINTIFF'S REBUTTAL BRIEF TO
DEFENDANTS' MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM
UNDER 42 U.S.C. 1983

I. PRELIMINARY STATEMENT

Plaintiff, in earlier pleadings, stated in detail the facts he alleges as causes of action in his original Complaint and the law pertaining thereto. This brief will address only the issues raised by the following documents:

1. Plaintiff's Amended Complaint alleging a cause of action under 42 U.S.C. 1983.

2. Defendant's Motion to Dismiss Plaintiff's Amended Complaint for Failure to State a Claim upon Which Relief Can be Granted.

3. Defendant's Brief accompanying that Motion.

Attached hereto are the affidavits of Dr. Grant Steffen, President of the combined staff of Swedish Medical Center and Porter Memorial Hospital and that of Dr. Burt. Plaintiff has elected to submit these affidavits so that the court will be aware of the extent of the harm Dr. Connolly has caused Dr. Burt and the realities of licensing of orthopedic surgeons apart from a cursory examination of state licensing statutes. Taken together these affidavits establish: that Dr. Burt spent three long years at a significant salary reduction in order to become an orthopedic surgeon; that Dr. Burt did become an orthopedic surgeon and was duly

licensed as such through a Certificate of Residency signed by Dr. Connolly, that the Certificate of Residency which Dr. Connolly signed functions as a license to practice orthopedic surgery within the custom and practice of the medical profession; and that Dr. Connolly's action wrongfully revoked that license through a malicious libel. The Constitutional manifestations of these facts will be discussed below.

At the outset, Plaintiff submits the universally accepted rule that a Motion to Dismiss for Failure to State a Claim should not be granted unless it clearly appears that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *See Russo v. Eddington,* 483 F. Supp. 739 (1980), *Conelly v. Gibson,* 355 U.S. 41 (1957), *Kennedy v. Meacham,* 540 F.2d 1057 (10th Cir. 1976).

II. PLAINTIFF'S CAUSE OF ACTION UNDER 42 U.S.C. 1983

Plaintiff's Amended Complaint brings a claim before this court based upon 42 U.S.C. 1983 which states,

> "Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit at equity or other proper proceeding for redress."

The basis of Plaintiff's Complaint is that he was wrongfully and maliciously libeled by Dr. Connolly, acting under color of state law as a representative of The

Board of Regents of the State of Nebraska. Plaintiff further alleges that such slander amounted to a Constitutional deprivation cognizable under 42 U.S.C. 1983 because Plaintiff had a property interest in his Certificate of Residency guaranteed to him by the Fourteenth Amendment to the Constitution and a property interest in his right to make a living as an orthopedic surgeon. Plaintiff further alleges a liberty interest, also guaranteed to him by the Fourteenth Amendment, in his right to travel the country free from defamation in his occupation, Dr. Connolly's actions, Plaintiff alleges, amounted to a constructive taking of his Certificate of Residency to practice orthopedic surgery. Neither the state of Nebraska nor the state of Colorado could have simply revoked Plaintiff's Certificate of Residency, *ex parte*. Dr. Connolly, the same person who signed Plaintiff's Certificate of Residency, however, accomplished that act of taking Plaintiff's Certificate through an October 21, 1980 letter to Presbyterian Denver Hospital, stating among other things,

> "I think he might serve adequately in some field of medicine but not that of orthopedic surgery."

Similar letters were written by Dr. Connelly to several other hospitals.

III. DEFENDANT'S BRIEF

The bulk of Defendant's Brief seems to have misconstrued the gravamen of Plaintiff's complaint, thus sidetracking the Constitutional inquiry which is before the Court. This is not a case of wrongful firing, as the vast majority of cases cited by the Defendant involve.* Plain-

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*[1]Two of the cases cited in Defendants' Brief actually involve defamation cases; more than ten cases cited by Defendant are wrongful firing fact patterns.

tiff does not claim he had a right to a hearing before Dr. Connolly wrote his recommendation. There is no balancing test that must be accomplished by the Court. (Heading III in Defendant's Brief.) Additionally, Plaintiff does not contest that the practice of medicine "is not an ordinary trade" (page 6 of Defendant's Brief). Nor, does this case concern an effort by the Plaintiff to secure the Court's aid in reviewing his academic record (*See Gaspar v. Bruton,* 513 F.2d 843 (10th Cir. 1975) cited on page 7 of Defendant's Brief). Indeed, Plaintiff's academic records while at the University of Nebraska were at least satisfactory, if not laudable. Plaintiff furthermore does not contest the Hospital Board's right to write Dr. Connolly and inquire into Plaintiff's academic qualifications (page 8 of Defendant's Brief). In the same vein, Plaintiff does not contend that his liberty interest, nor his property interest were violated by a mere evaluation by Dr. Connolly. (heading 4(c) of Defendant's Brief)

What Plaintiff does allege, is an intentional abuse of discretion by Dr. Connolly. Defendants, in their Brief state:

> "The Plaintiff here has not alleged facts, if true, which would constitute an abuse of discretion on the part of Defendant, and therefore may not seek judicial review of his scholastic or clinical evaluations."

This is not consistent with allegation 12 of Plaintiff's Complaint,

> "The foregoing statements by Defendant Connolly were false when made and made *with malice on the part of Defendant Connolly* toward Plaintiff."

Quite simply, when Dr. Connolly signed Plaintiff's Certificate of Residency to practice orthopedic surgery on

June 30, 1977 he told all the world, including the Plaintiff, that Plaintiff was competent to practice orthopedic surgery. In spite of this three years later Dr. Connolly completely reversed his position although the two had no contacts during that intervening period. As Plaintiff will prove at trial, Dr. Connolly's acts amounted to bad faith and malice in the nature of *New York Times v. Sullivan,* 376 U.S. 254 (1964), and further constituted a complete abuse of Dr. Connolly's discretion.

IV. PRE *PAUL* FEDERAL CASE LAW

Until the case of *Paul v. Davis,* 424 U.S. 693 (1976), Federal Courts were free to find violations of Constitutional rights in cases similar to the facts alleged herein. In *Warren v. National Association of Secondary Principals,* 357 F. Supp. 1043 (N.D. Texas 1974), for example, a High School student's 1983 action against the National Honor Society and other Defendants was upheld. The student alleged that he had wrongfully been expelled from the Honor Society for drinking a beer in a Pizza Hut. Citing *Board of Regents v. Roth,* 408 U.S. 564 (1972), the Court found a liberty interest in Plaintiff's "good name, reputation, honor and integrity," at 1040(a). Similarly, in *Tucker v. Duncan,* 499 F.2d 963 (4th Cir. 1974), police officers were held liable to Plaintiff for unlawful arrest and use of unlawful force, essentially simple state law tort action.

In 1971, the Supreme Court, in *Wisconsin v. Constantinue,* 400 U.S. 433 (1971) struck down a Wisconsin statute which allowed the Chief of Police to *ex parte* place certain persons on a list specifying them as "known drinkers". The Court, in striking down the statute, found

that the Plaintiff had a constitutional interest in her reputation. Quoting from the lower court's opinion at 302 F. Supp. 864 the court said:

> "It would be naive not to recognize that such posting or characterization of an individual will expose him to public embarrassment and ridicule, and it is our opinion that procedural due process requires that before one acting pursuant to State Statute can make such a quasi-judicial determination, the individual involved must be given notice of the intent to post and opportunity to present his side of the matter."

Wisconsin v. Constantinue was later distinguished by Justice Rhenquist in *Paul v. Davis* on grounds that the statute involved a revocation of a statutory right to drink alcoholic beverages. This point of distinguishment, was, however, of no concern to the *Constantinue* Court.

> "The only issue presented here is whether the label or characterization given a person by posting though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and opportunity to be heard." (at p. 436)

Clearly, the court's concern was for the good name of the individual rather than a constitutional right to drink alcohol. Even accepting Defendant's interpretation of *Wisconsin v. Constantinue,* it would seem that Dr. Burt's right to practice his chosen field of medicine should rank at least as high on the constitutional scale as Ms. Constantinue's right to consume a Budweiser or stronger alcoholic substance.

V. *PAUL v. DAVIS*

Paul v. Davis, 424 U.S. 693 (1974) marks the most recent case in which the Supreme Court has spoken regarding the plausibility of a defamation type action against state officials under 42 U.S.C., Section 1983. In *Paul*, Plaintiff, Davis, was placed on a list of known "shoplifters" by Defendant Paul, Chief of Police of Louisville, Kentucky. The list, which included Davis's "mugshot" was distributed to area merchants before the Christmas season. Plaintiff happened to be on this shoplifters list due to a prior arrest for shoplifting for which he had pled not guilty and the charges were therefore "filed away by the local court".

Plaintiff was a newspaper photographer and the mug book was circulated to Plaintiff's supervisor at the paper. The supervisor called Plaintiff to his office and demanded an explanation for Plaintiff's appearance on the circular. Plaintiff explained his appearance and no disciplinary action was taken against him at all. Plaintiff, however, brought an action pursuant to 42 U.S.C. 1983. The Court, after a lengthy survey of Fourteenth Amendment and 42 U.S.C. 1983 law held that Davis did not establish a constitutional violation guaranteed to him by the Fourteenth Amendment. Simple defamation, reasoned the court, is simply matter of state tort law.

The factual context of *Paul* is extremely important. Plaintiff was not fired. He alleged no special damages. His claim was purely a libel claim for general damages. The court, apparently mindful of the difficult distinc ion between simple tort actions and constitutional violations, left the door open for defamation suits involving more serious violations of constitutional rights.

"It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant in the Due Process Clause." (at p. 710)

"While we have in number of our prior cases pointed out the frequently drastic effect the 'stigma' which may result from defamation by the government in a variety of contexts, this line of case does not establish the proposition that reputation alone, *apart from some more tangible interests, such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause.*" (emphasis supplied at p. 701).

VI. POST *PAUL* FEDERAL COURT DECISIONS

Paul, a five to three decision authored by Justice Rhenquist, has been widely criticized by constitutional scholars. *See Glennan, Constitutional Liberty and Property: Federal Common Law in § 1983:* 51 S.Cal.L Rev. 355; *Monahans. Of "Liberty" and "Property"* 62 Cornell L. Rev. 1977. The so-called "defamation plus" rule of *Paul* leaves open the obvious question as to what or how much "plus" is required in order to state a constitutional claim. Many Federal Courts have interpreted *Paul* very narrowly, allowing a 1983 action whenever the slightest hint of an additional property or liberty interest is alleged. For example, the Seventh Circuit requires the Plaintiff only to show he has lost tangible property within the common sense definition of the term. Thus, in *Kimbrough v. O'Neill,* 575 F.2d 1089 (7th Cir., 1976), Plaintiff's 1983 claim alleging the theft of a ring by a prison official was allowed although Plaintiff's action sounded in common law tort. The Court allowed the claim on the basis that the Fourteenth Amendment protects

property and a prisoner's ring is obviously his property. Similarly, Dr. Burt invested over $40,000.00 in setting up an orthopedic clinic in Vail, which he lost in total due to Dr. Connolly's letter.

In *Fitzgerald v. Mountain Laurel Racing*, 464 F. Supp. 263 (W.D. Pa. 1979), the Court allowed a 1983 action upon a defamation claim in which the Plaintiff clearly could not demonstrate as strong a property or liberty interest as can Dr. Burt. *Fitzgerald*, involved a 1983 action brought by a harness horse racing driver for an allegedly unwarranted suspension of racing privileges at a particular track. Plaintiff could still have continued racing at other tracks, but he was barred from the track at Mountain Laurel. A racing commission directive, however, required the Mountain Laurel track to notify all other Pennsylvania racing tracks of the suspension. The Court found that the Plaintiff had a liberty interest in his reputation when that reputation related to his occupation. Plaintiff was thereby awarded an injunction reinstating his racing privileges at Mountain Laurel Race Track. Referencing the rule of *Paul v. Davis*, the Court said:

> "In the instant case, however, the *impairment of future business opportunities* to the Plaintiff as a result of Defendant's acts has been alleged, and we conclude the likelihood thereof sufficiently proved." (p. 266, emphasis added)

The *Fitzgerald* Court found a liberty interest in merely the likelihood of loss of future business opportunities. Dr. Burt's affidavit, in contrast, demonstrates clear consequential damages flowing from the defamation. Dr. Burt terminated employment in California and invested substantial sums in the Vail clinic. The only reason that

Burt could not enjoy the benefits of this investment was the libel of Dr. Connolly.

In *Safeguard Mutual Insurance Company v. Miller*, 477 F. Supp. 299 (E.D. Pa., 1979), Plaintiff, an insurance company, brought a 1983 action for several claims for relief against employees of the Pennsylvania Insurance Department. All claims sounded in common law tort: trespass, misfeasance, malfeasance and defamation. The Defendants, citing to *Paul v. Davis*, claimed that the Plaintiff's causes of action were not protected by the Fourteenth Amendment due to their common law tort nature. While the Court agreed with the Defendant's characterization, it did not agree that that characterization precluded a constitutional claim. The defamation which was complained of caused a suspension of Plaintiff's insurance license and amounted to a malicious attempt to have the license revoked. Plaintiffs had a right, sanctioned by State Law, the Court stated, to operate in the insurance business, and the unlawful attempt to extinguish that right amounted to a violation of Plaintiff's constitutional rights.

In *Morrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980), the Fifth Circuit read *Paul* only to bar "purer reputation claims", those claims not involving any tangible monetary damage. *Morrero* involved an unlawful search and seizure of a jewelry store owned by a corporation controlled solely by the Plaintiff. The local press covered the search on the scene and thanks to the cooperation of the local police and prosecutors issued statements to the press stating that $75,000.00 in stolen property had been recovered from Plaintiff's business. The Plaintiff alleged that the charges were totally false and commenced a 1983 action against the government.

In ruling for the Plaintiff, the Court reviewed *Paul* at length. *Paul,* said the Fifth Circuit, involved a two step reasoning process. First, *Paul* found that reputation alone was not a liberty interest recognized by Federal Law. *Paul* held that liberty interest is applicable only when an individual's reputation is stigmatized in some specific constitutional guarantee or some "more tangible" interest (quoting *Paul* at 700-701). Secondly, said the Fifth Circuit, under Kentucky state law reputation was not a liberty or property interest and thus any harm or injury inflicted could not constitute an unconstitutional deprivation of that interest. Applying that analysis to the facts of *Morrero,* the Fifth Circuit concluded that Morrero stated a claim for at least four reasons, any of which standing *alone* would sanction a 1983 claim: (1) Morrero's claim also involved a Fourth Amendment violation and hence the defamation could be viewed as flowing from a constitutional claim; (2) Florida law, unlike Kentucky law, recognized good will as a "property interest" (for example, under Florida case law good will is compensable as a property loss in a condemnation claim) thus placing Plaintiff's claim within the property realm of the Fourteenth Amendment; (3) Plaintiff's claim for good will was in the more "tangible realm" in that Plaintiff's business, a tangible entity, was harmed; (4) Plaintiff's claim was in the nature of "reputation plus", in that Fourth Amendment rights were violated and thus sanctioned by *Paul* as a "reputation plus" claim.

While Plaintiff herein does not claim a search and seizure violation, he clearly has rights falling within the Courts' second and third categories. Colorado, as does Florida, recognizes an interest in good will. Section 7-60-

109 3(b), C.R.S. 1973, for example, provides that no partner in a partnership shall dispose of the good will of a business without the approval of other partners. Dr. Burt, as in the case of any physician, or any businessman, had a good will asset in his practice of medicine which was not only infringed upon but indeed rendered worthless through the actions of the Defendants.

There is a well established line of cases holding that when the government terminates employment as a result of some action which may be defamatory, a 1983 action will lie, even though the employment is terminable at will. *See Harris v. Havey*, 436 F. Supp. 143 (E.D. Wis. 1977); *Zaccagnini v. Morris*, 470 F. Supp. 1199 (D. Mass. 1979); *Puff v. County of Butler*, 524 F. Supp. 751 (W.D. Pa. 1981); *Calaizzi v. Walker*, 542 F.2d 969 (7th Cir. 1976); *Stretten v. Wadsworth*, 537 F.2d 361 (9th Cir. 1976); *McGee v. Draper*, 564 F.2d 902; reheard, 639 F.2d 639 (10th Cir. 1981). Defendant, apparently recognizes this line of cases and, indeed, cites it as the established rule. [See page 12, Brief of Defendant.] *Doe v. United States Civil Service Commission*, 483 F. Supp. 539 (S.D.N.Y. 1980) took that line of cases, one logical step further. *Doe* stands for the proposition that not only termination of employment plus defamation constitutes a 1983 claim, but *foreclosure from possible employment* plus defamation also constitutes a claim under 1983.

In *Doe*, Jane Doe (a pseudonym) applied for employment on the White House Fellowships Commission, a highly coveted position. Extensive interviews were conducted regarding Doe's character and competence. Two of those people interviewed said that Doe had a propensity to steal. Doe was not chosen for the position, allegedly

due to those allegations. Doe thereafter brought a 1983 action against the Civil Service Commission which, among other things, alleged that the Commission's refusal to disclose the identity of the informants, while at the same time refusing to expunge those allegations, violated her right to due process of law.

After reviewing several complicated questions involving the Administrative Procedure Act, the Privacy Act and the Freedom of Information Act, the Court reached the question of *Paul v. Davis*. *Paul*, said the Court, stood for the proposition that mere defamation alone would not constitute a constitutional claim. The Plaintiff in *Doe*, however, claimed more. Foreclosure from possible employment, reasoned the Court, was tantamount to loss of employment and thus within the "defamation plus" rule of *Paul*. The Court quoted *Paul* as sanctioning a 1983 action when:

> "Government'(s) action operated to bestow a badge of disloyalty or infamy, with an intended foreclosure from other employment opportunities."

VII. 10th CIRCUIT CASES

The issue now before the Court has been raised to the Plaintiff's knowledge three times within the 10th Circuit-twice before Judge Kane and once before the 10th Circuit Court of Appeals.

Sorenson v. Zapien, 455 F. Supp. 1207 (D. Colo. 1978) involved a 1983 claim by a prison inmate against a member of his parole board. At Plaintiff's parole hearing the Defendant mentioned that the Plaintiff looked like a man that had been charged with rape and that Plaintiff might actually be that man. Plaintiff consequently brought a

1983 action. Not only did Plaintiff have no tangible property loss or other protected interests, but Judge Kane had difficulty in taking Plaintiff's claim seriously and thereby dismissed it.

> "Plaintiff further submits that his character 'will be duly damaged as a result of the unnecessary statements and intuitive inflamatory derogatory remarks of Defendant(s)'. His convictions for unauthorized distribution of controlled substances, escape and aggravated robbery suggest that his concerns are somewhat eristic." (at p. 1208)

In *Russou v. Eddington*, 483 F. Supp. 739 (D. Colo. 1980), Judge Kane again examined a 1983 defamation claim, this time against the Greeley Police. The Plaintiff, a fired police officer, alleged his employment was terminated because he had engaged in lawful union activities. The claim, in the nature of an unlawful hiring, also involved a subsequent defamation regarding to Plaintiff's possible future employment opportunities. Plaintiff alleged that after he was fired the Chief contacted neighboring law enforcement agencies and advised them that if they wanted to continue having "good relations" with the Greeley Police Department they had better not hire the Plaintiff. Judge Kane had no problem with this claim.

> "Not only did these communications directly interfere with Plaintiff's opportunities to find a job, but they were allegedly backed by Eddington's 'advice' that anyone hiring Plaintiff would no longer have 'good relations' with the Greeley Police Department, *such 'advice' standing alone* would support a Section 1983 claim." (emphasis supplied, at p. 746)

In *McGee v. Draper*, 564 F.2d 902, 639 (10th Cir. 1981), a school teacher in a small Oklahoma town was fired due to allegedly false statements made concerning her lack

of sexual morality. The first time the Tenth Circuit examined the case they reversed the lower court upon the granting of a Motion to Dismiss for Failure to State a Claim. On the remand, the District Court still disallowed Plaintiff's damage claim. On appeal for the second time the Tenth Circuit again remanded the case, this time directing the District Court to allow Plaintiff to prove consequential damages. While *McGee* is clearly within the line of cases establishing a 1983 claim for termination of employment plus defamation, Judge Holloway, writing the opinion of the Court, added by footnote some guidance to the District Courts in ruling upon these types of claims.

> "The requirement of *Paul v. Davis* that reputational harm be entangled with 'some more tangible interests' is thus met when a terminated or non-renewed § 1983 plaintiff can show that the termination at least aggravated his stigmatization. *We do not mean to imply that his is a heavy burden for a plaintiff.* Any termination occurring in an atmosphere where the plaintiff's reputation is at issue should be considered sufficient to meet *Paul's* entanglement requirement. *It should be the state's burden to show that termination in such a context is so removed from the plaintiff's reputational concern that it in no way impacted upon it.*
>
> *Similarly, we should not be interpreted as implying that discharge from employment is the exclusive context in which a 'tangible interest' can be entangled with a plaintiff's liberty interest for Section 1983* purposes." *See,* e.g. Monaghan, *"Of Liberty" and "Property"*, 62 Cornell L.Rev. 405, 432-33 (1977). (Ft. nt. 2 at p. 643)

The passage quoted in "Of Liberty" and "Property" begins "if not overruled, *Paul* should be read as narrowly as possible".

VIII. PLAINTIFF'S PROPERTY INTEREST IN HIS CERTIFICATE OF RESIDENCY

Defendant takes a peculiar position in regards to Plaintiff's Certificate of Residency:

> "It is apparent that Plaintiff's claim of a 'reasonable entitlement' to practice orthopedic surgery is a mere *subjective unilateral expectation*, insufficient to invoke the protection of Due Process Clause of the Fourteenth Amendment." (at p. 6, Defendant's Brief, emphasis added)

One wonders if the University of Nebraska informs its incoming students that upon successful completion of their three year program in orthopedic surgery they will be entitled to a "mere subjective unilateral expectation" of ever using their training.

Citing to the statutory licensing schemes of Colorado and Nebraska, Defendants point out that there is no such thing as a license to practice orthopedic surgery. Since there is no such license, they argue, there can be no entitlement and therefore no Constitutional violation.

It is correct that the state licensing schemes do not recognize a specialty of orthopedic surgery. All medical doctors receive only a general license to practice medicine. Within medical licensing schemes, a general practitioner may thereupon practice any type of medicine he can get a patient to submit to. As the affidavit of Dr. Grant Steffen points out, however, there are controls upon doctors practicing specialties exercised within the profession of medicine, and as such a Certificate of Residency is a defacto license to practice orthopedic surgery. Each hospital certifies whether a medical doctor is capable of performing any particular type of work at that hospi-

tal. If the doctor is capable, he is granted hospital staff privileges. Alternatively, if a doctor is deemed incapable, he is denied staff privileges. This denial of staff privileges is fatal to the careers of most specialists in that most specialties require equipment and ancillary personnel such as anesthesiologists and other specialists that only a hospital can offer. The Certificate of Residency is the main criteria which a hospital examines when deciding to grant or deny privileges of a prospective specialist. As Dr. Steffen explains, Dr. Connolly's complete condemnation of Plaintiff's orthopedic surgery skills in itself would prevent Plaintiff from ever being granted any type of privileges on a reputable hospital staff. The end result is to realistically deprive Plaintiff of the ability to practice orthopedic surgery. Without hospital priveleges one cannot be an orthopedic surgeon.

There are numerous cases standing for the proposition that a state may create an entitlement by other means than a statutory licensing scheme. In *Goldberg v. Kelly*, 397 U.S. 254 (1968), for example, entitlement was created by the state simply through a course of conduct in supplying welfare benefits. In *Perry v. Sinderman*, 408 U.S. 593 (1972), the Court said that 1983 claimants should be allowed to prove an entitlement "in light of the policies and practices of the institution". *See also Bishop v. Wood*, 426 U.S. 341 (1972). The affidavit of Dr. Steffen establishes that there is a defacto licensing scheme regarding orthopedic surgeons and that a Certificate of Residency is the normal means of licensing. Without a Certificate of Residency, a medical doctor cannot function as an orthopedic surgeon. By certifying Dr. Burt as having successfully completed a residency and later condemning his

abilities, Dr. Connolly revoked Plaintiff's defacto license to practice his chosen profession of orthopedic surgery.

IX. THE ISSUE OF FEDERALISM

Throughout Justice Rhenquist's opinion in *Paul v. Davis* runs a concern that Federal Common Law through 42 U.S.C. 1983 might come to preempt State Common Law tort actions whenever any type of action by the State is involved.

> (The Plaintiff) apparently believes that the Fourteenth Amendments Due Process Clause should *ex proprio vigore* extend to him a right to be free of injury wherever the State may be characterized as a tort feaser. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states." (at 693)

This concern is perhaps valid if the Plaintiff has a remedy under the tort law of any particular state. The concern certainly shifts, however, if Plaintiff is left in the position of being clearly wronged without a remedy.

In *Application of Jordan,* 439 F. Supp. 199 (D. W.Va. 1977), Plaintiff was named by a Federal Grand Jury in an indictment as a co-conspirator with a different indicted criminal defendant. Plaintiff himself, however, was never indicted. Plaintiff, who was the commissioner of banking in West Virginia, suffered injury when his name appeared in a Federal Grand Jury indictment. While Plaintiff did not lose his employment nor any other tangible interest that can be shown by Plaintiff herein, he still enjoyed a cause of action under 42 U.S.C. 1983. *Paul v. Davis,* reasoned the Court, involved the usurpation of state tort law. Plaintiff in *Paul* had the option of bringing a claim in

State Court for defamation, but the Grand Jury in Jordan's case was immune from a common law tort suit. Therefore, the concerns in *Paul* did not apply and Plaintiff was allowed to proceed under § 1983 as it was the only possible redress for his injuries.

The rationale of application of *Jordan* is certainly analogous to Dr. Burt's position. Defendant, in a previously filed brief has asserted that both Defendants are immune from lawsuit based upon the Eleventh Amendment. Alternatively, they assert in this Brief that Plaintiff does not assert a claim arising to a constitutional dimension. A ruling in Defendant's favor on both issues would leave Dr. Burt remediless.

It is obviously of the utmost importance that State School Officials act with the highest degree of care and impartiality when passing on a request for recommendation for a former student. A few unfair words in these situations can literally destroy a promising man's career. A dismissal of the 1983 claim and a grant of Eleventh Amendment immunity to government officials in these types of cases would amount to a court blessed absolute immunity and a license for officials in such key positions to maliciously abuse their discretion.

X. CONCLUSION

In order to establish a cause of action under Title 42 U.S.C. 1983, a plaintiff must establish that he was deprived of a right, privilege or immunity "secured by the Constitution and the laws" and that such action was done by a person acting "under color of any statute, ordinance, regulation, custom or usage". There is no dispute that

Defendants were acting under color of state law. The defense raised herein is that Plaintiff was not deprived of any right, privilege or immunity secured by the Constitution. There is ample case law, however, establishing the following theories of liability upon the Defendants pursuant to § 1983.

1. Through the actions of Defendants, Plaintiff suffered a violation of his property rights guaranteed to him by the Fourteenth Amendment in that Plaintiff is able to show actual dollar figure tangible losses of income and property, which amounts to a deprivation of property within the common useage of the term.

2. Through Defendant's actions Plaintiff suffered a violation of his liberty rights guaranteed to him by the Fourteenth Amendment in that Defendant infringed Plaintiff's reputation in his occupational field thereby impairing Plaintiff's past, present and future business opportunities.

3. Through Defendant's actions Plaintiff suffered a violation of his liberty interest guaranteed to him by the Fourteenth Amendment in that Defendant's actions caused Plaintiff infamy and foreclosed possible employment opportunities.

4. Through Defendant's actions Plaintiff suffered a violation of his property interest guaranteed to him by the Fourteenth Amendment in that Colorado Law recognizes good will as a valid property right and Defendant's actions damaged Plaintiff's business good will.

5. Through Defendant's actions Plaintiff suffered a violation of his property interest guaranteed to him by the Fourteenth Amendment in that Plaintiff had a right

to practice his chosen occupation of orthopedic surgery and actions of Defendants amounted to a defacto taking of his Certificate of Residency and his license to practice medicine.

6. Through Defendant's actions Plaintiff suffered a violation of his liberty interest in that he was defamed and even a simple defamation amounts to a constitutional violation when Plaintiff is deprived of any other remedy.

Paul v. Davis, the lead Supreme Court case in this area, while holding that defamation was not a constitutional violation standing alone, left to the discretion of the lower Federal Courts to find constitutional violations in a variety of situations including facts similar to the Plaintiff's claim. The Tenth Circuit has already pronounced that prospective 1983 plaintiffs shall not have a heavy burden in establishing constitutional violations in defamation actions. The Court therefore should follow the Tenth Circuit's lead, interpret *Paul v. Davis* narrowly, and allow Dr. Burt's claim.

Respectfully submitted,

HANNON, STUTZ, DYER & MILLER
By: /s/ ROBERT J. DYER, III
Attorneys for Plaintiff
825 Logan Street
Denver, Colorado 80203
Telephone: 861-1200

[Certificate of Mailing omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-JM-1850

[Title omitted in printing]

AFFIDAVIT OF DR. GRANT STEFFEN

My name is Dr. Grant Steffen. I am president of the combined staff of Swedish Medical Center and Porter Memorial Hospital. I am familiar with the general practices of granting of hospital staff privileges within the medical profession. To my knowledge, I do not know any of the parties involved in this lawsuit.

Medical doctors receive only a general license to practice medicine. There are certain informal controls, however, which the profession exercises to assure that only those medical doctors who are qualified to perform certain tasks are allowed to perform those tasks. As an extreme example, within state licensing schemes, a general medical practitioner is licensed to perform brain surgery. While he may be licensed to do so, he probably is not competent to do so. In this area, hospital staff privileges play a major role. While it is theoretically possible to perform brain surgery in a doctor's back office, it is not practicably feasible. In order to perform work required in most specialties one needs the privileges of the use of facilities of a hospital. Hospitals then exercise their own controls on who they allow to practice the specialty within their facilities. For all practical purposes, if a specialist, at least in surgery, cannot receive hospital privileges, he cannot practice his specialty.

When a medical doctor applies for staff privileges in most hospitals, the hospital performs a search of the doc

tor's credentials. One of the major credentials a doctor must have is a Certificate of Residency in a particular specialty. Usually a doctor presents a hospital he is applying to with a Certificate of Residency from a teaching institution and that hospital then seeks to confirm the residency with the teaching institution.

Attached to this Affidavit is a letter dated October 21, 1980 signed by a Dr. John E. Connolly, referencing a Dr. Kelly Burt. I can say that based upon this letter and this alone, Dr. Burt would not have been given staff privileges upon a hospital staff which I headed. The statement that he is not qualified to practice orthopedic surgery, coming from the Chairman of his Residency Program, would probably be enough in itself to prohibit Dr. Burt's appointment on any reputable hospital staff.

/s/ Dr. Grant Steffen

[Subscription omitted in printing]

[Attachment to Affidavit of Dr. Grant Steffen (letter of October 21, 1980 signed by John F. Connolly) is reproduced at p. 37 of this Joint Appendix.]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-1850

[Title omitted in printing]

AFFIDAVIT OF ANDREW K. BURT

My name is Andrew K. Burt. I am the Plaintiff in this case.

I received a Bachelor of Arts from Nebraska State University in 1965. I next went to medical school at the University of Nebraska between the years 1965 and 1969, the year I graduated. I then spent a year of residency as a surgical intern at Queen's Hospital in Honolulu, Hawaii. The next two years I spent as a Flight Surgeon in the military, stationed in Vietnam. Upon discharge from the service I returned to Nebraska where I worked at Lincoln General Hospital and Lutheran Hospital, and practiced general medicine in Loup City, Nebraska. In Loup City I was making in excess of $50,000.00 per year, but I decided that surgery is what I really enjoyed doing. I decided to go to Emmanuel Hospital in Portland where, after a year, I received a certificate of residency in General Surgery. From there I spent three years as a resident in orthopedic surgery at the University of Nebraska. During my entire time spent as a resident I received roughly $12,000.00 per year in compensation.

Dr. John F. Connolly headed the Orthopedic Surgery program at the University of Nebraska. As such, I took many courses from him. I would describe my work at the University of Nebraska in orthopedic surgery as average. I passed every course which was required, including several courses from Dr. Connolly. The only grades given druing my entire residency were on a pass/fail basis. Although at least two people during my term of residency were asked to resign from the program, I completed the residency. At that time, I received a Certificate of Residency from the University of Nebraska, signed by Dr. Connolly in 1977.

After graduating from the University of Nebraska in Orthopedic Surgery, I took a job with the Western Physi-

cians Medical Group in Alameda, California. My salary was in the neighborhood of $60,000.00 per year. My responsibilities, however, were mainly in the area of primary care.

I had a strong desire to work in the field of Orthopedic Surgery, as I had invested several years into training for the field and it was plainly what I wanted to do. I decided that Vail, Colorado would be an ideal place to practice orthopedic surgery.

I quit my job in California and moved to the Vail area. I invested over $40,000,00 out of pocket costs in setting up a practice. To my surprise, however, I was denied staff privileges at Vail Hospital. This made it almost impossible to practice orthopedic surgery as a surgeon obviously needs hospital privileges in order to practice. There was one remaining hospital in the area, however, St. Vincent's at Leadville, Colorado. I also applied to St. Vincent's but my privileges were denied.

I was told by both hospitals that I had otherwise excellent credentials, but that Dr. Connolly who headed the Orthopedic Surgery program where I was a resident had said I was absolutely unqualified to practice in the field. As such, neither hospital would allow me anything but consulting privileges and surgical assistance of another doctor.

As I was unable to practice in the Vail area, but as I had already come to Colorado, I decided to move to Denver. There, I ran into the same problems that I had in Vail. I was denied privileges at St. Anthony's Hospital and at Denver Presbyterian. Finally, after a lengthy hearing of which I accrued substantial attorneys' fees, I

was granted emergency room privileges at a Denver hospital. While this job paid the bills, I could have done emergency room work upon my graduation from medical school. In short, Dr. Connolly's actions made it impossible for me to practice orthopedic surgery.

After I spent awhile in Colorado, I became discouraged and decided that the best I could do was reclaim my old position. I reapplied at Western Physician's Medical Group in California and was reaccepted. I hold that position to this day.

What I find impossible to understand is that if Dr. Connolly found me completely incapable to practice orthopedic surgery, why did he pass me in every course, and why was I allowed to graduate and issued a Certificate of Residency. I spent three years of my life earning low salary and working long hours to become an Orthopedic Surgeon. Dr. Connolly knowingly allowed me to spend those years in preparation for my career, and later took that career away.

/s/ Andrew K. Burt

[Subscription omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-JM-1850

[Title Omitted in printing]

PLAINTIFF'S REBUTTAL
BRIEF TO
DEFENDANT'S ORAL ARGUMENT

I. PRELIMINARY STATEMENT

On September 20, 1982, on oral argument upon Defendant's Motion to Dismiss, counsel for the Defendants cited approximately seventeen cases which, until that time, had not been previously briefed nor supplied to counsel for the Plaintiff, all cases purportedly speaking to one of the following defenses upon Plaintiff's claim under 42 U.S.C. Sec. 1983.

1) Plaintiff's claim against Defendant, Board of Regents, under 42 U.S.C. Sec. 1983 is barred by the Eleventh Amendment to the United States Constitution.

2) Plaintiff's claim under 42 U.S.C. Sec. 1983 against Defendant, Board of Regents, is barred in that the Board of Regents is not a person within the meaning of 42 U.S.C. Sec. 1983.

3) Plaintiff's claim under 42 U.S.C. Sec. 1983 against Defendant, Connolly, is barred in that Connolly's actions were performed in his official capacity and as such both he and the Board of Regents are entitled to an Eleventh Amendment immunity, in that the Board of Regents and State of Nebraska are the real parties in interest.

Pursuant to the court's ruling this brief will address these points and other new arguments raised during oral argument.

II. PLAINTIFF'S 42 U.S.C. Sec. 1983 CLAIM AGAINST THE BOARD OF REGENTS

Counsel for the Defendant cited several cases where the state itself was held not to be a person within the meaning of 42 U.S.C. Sec. 1983. *Aubochon v. State,* 631 F.2d 581 (8th Cir. 1980), *Prostrollo v. University of South Dakota,* 507 F.2d 775 (8th Cir. 1974), *Avis v. Mangun,* 450 F.2d 932 (2nd Cir. 1971). Alternatively, counsel cited several cases where the State was found to be a "person" under the language of 42 U.S.C. 1983, but was still dismissed from the lawsuit pursuant to the Eleventh Amendment. Bickley v. University of Maryland. 527 F. Supp. 174 (D. Mar. 1981), LaCompte v. University of Houston, 535 F. Supp. 317 (S.D. Tex. 1982), Vaugh v. Board of Regents, 504 F. Supp. 1349 (E.D. of Cal. 1981). This issue, as it pertains to Plaintiff's claim herein, is entirely academic. It is Plaintiff's contention that the Board of Regents of the State of Nebraska is not an arm of the State, but a separate political entity. Therefore, the Eleventh Amendment. as the cases cited by Plaintiff in his previous brief establish, does not apply to the Board of Regents of the State of Nebraska. Plaintiff's claim pursuant to 42 U.S.C. Sec. 1983 neither adds nor takes away from the concerns regarding the Eleventh Amendment previously briefed. As such, Plaintiff stands on his earlier assertion that the Eleventh Amendment does not bar any of Plaintiff's claims.

III. PLAINTIFF'S 42 U.S.C. 1983 CLAIM AGAINST DEFENDANT CONNOLLY

During oral argument counsel for Defendant cited several cases establishing that when a government official

is a nominal defendant in a suit for damages, but the action is really against the State because the demand is for State money or property, such suit is barred by the Eleventh Amendment. This principal, the rule of *Ford v. Dept. of Treasury of Indiana*, 323 U.S. 459 (1945) is well-established. *See* NAHMOD *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION* (1970) at 140. To apply this rule to the facts herein, however, would be a gross misapplication of the *Ford* case. Dr. Connolly has been sued in his individual capacity and Dr. Connolly is the party who has committed the wrong. It is axiomatic to state that an individual, whether acting within the scope of an agency relationship, or acting outside the scope of an agency relationship, is responsible for his own torts. DOOLEY *MODERN TORT LAW* (1980) at 356. Plaintiff's claim, sounding in defamation, is mainly a complaint against Connolly himself while he was acting in his official capacity for the Board of Regents. *Schueler v. Rhodes*, 416 U.S. 232 (1974), a case arising out of the Kent State incident, is directly on point. In *Schueler* the personal representative of the students who were killed during the Kent State shootings brought an action against the Governor of Ohio the Adjutant General and his assistant, various named and unnamed officers and enlisted members of the Ohio National Guard, and the President of Kent State University pursuant to 42 U.S.C. 1983. The district court dismissed the complaint on the grounds that the named individuals were, in substance and effect, the State of Ohio and the claim was therefore barred by the Eleventh Amendment. The U.S. Supreme Court, however, reversed and remanded the case to the District Court for further proceedings. The named defendants, said the Court, were

alleged to have "intentionally, recklessly, wilfully and wantonly caused an unnecessary deployment of the Ohio National Guard" and, in the same manner, personally ordered the Guard members to perform allegedly illegal actions which caused the death of Plaintiff's decedents. While the Eleventh Amendment bars suits against the States and applies when the State is the real party in interest, it cannot be used as a shield for a state official confronted by a claim that he has deprived another of a federal right under color of state law. Quoting from *Ex parte Young* 209 U.S. 123 (1908) the court said that when a state official acts under color of state law in a manner violative of the Constitution he,

> "comes into conflict with a superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected ***in his person*** to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *id* at 159-160.

The fact that the Nebraska Board of Regents may or may not carry liability insurance covering the actions of Dr. Connolly, or may or may not themselves indemnify Dr. Connolly for any damages incurred in relation to this law suit bears no consequence. This rationale has been advanced in a number of cases and resoundingly rejected. *See Ronwin v. Shapiro*, 657 F.2d 1071 (9th Cir. 1981) As stated by Professor Lawrence Tribe:

> "A state should not be able to turn a purely intramural arrangement with its officers to an extension of sovereign immunity." L. Tribe *American Constitutional Law* (1978) at 132

The purpose of liability insurance is not only to indemnify state officials, but also to provide a reliable source of re-

covery for injured parties with meritorious claims. It is entirely incongruous to argue that the state, by creating a fund to compensate victims, has somehow extended sovereign immunity to state employees so as to deny payment of the insurance to the class of beneficiaries the fund was created to benefit. *See Palmer v. Pen/Ohio Road Materials, Inc.*, 470 F. Supp. 1199 (W.D. Pa. 1979).

IV. LONG ARM JURISDICTION

In that, as far as counsel for Plaintiff could discern, Defendants have changed their position regarding long arm jurisdiction, counsel for Plaintiff would interpret the Court's September 20th direction as allowing comment regarding this Court's *in personam* jurisdiction pursuant to C.R.S. 13-1-124, 1973 as amended. Defendants' brief takes the position that Plaintiff must establish not only that Defendant committed a tort within the State of Colorado, but additionally that Defendant transacted business within this state. At oral argument on the 20th, counsel retreated from that position, admitting that Defendant committed a tort in Colorado, but alternatively claiming that Plaintiff must show certain "minimum contacts" in accordance with the substantial fairness test of *McGee v. International Life Ins. Co.*, 355 U.S. 220.

Neither of Defendants' contentions are correct. *Texair Flyers, Inc. v. District Ct. 1st Jud. District*, 506 P.2d 367 (1973) is directly on point. In *Texair*, Colorado Plaintiffs brought a wrongful death action against a corporation which gave flight instruction, rented and chartered aircraft solely within the state of Texas. The aircraft in question was chartered in Texas, but crashed in Colorado killing Plaintiff's decedents. Plaintiffs claimed Texair

was negligent in inspecting the aircraft and entrusting it to an untrained pilot.

Defendants challenged *in personam* jurisdiction, but the Supreme Court upheld, stating that while the actions of Texair were accomplished in Texas, the crash occurred in Colorado, thus bringing the Defendants within C.R.S. 13-1-124(b) "the commission of a tortious act within the state." Addressing the question of minimum contacts the court specifically rejected the arguments that any minimum contacts need be shown. Citing the following language from *Newman v. Fleming*, 331 F. Supp. 973 as controlling, the Court said:

> "the minimum contacts requirement does not have to be read into the language of 'commits a tortious act or omission within the state'. Where a non-resident enters a state and commits a tort no showing of continuous activity in the jurisdiction is required. Jurisdiction is sustained by the commission of a single tort." *id* at 370

While the application of the minimum contacts test to the facts of this case is totally unnecessary, Defendants, at any rate, do meet the requirement of minimum contacts pursuant to *McGee*. Colorado courts have interpreted the minimum contacts test as a showing that Defendants have "purposely availed themselves of the privilege of conducting activities in the form state" which seems to be mainly a test of foreseeability. *Lichina v. Futura, Inc.*, 260 F. Supp. 252 (D. 1966). While Dr. Connolly's recommendation was certainly solicited from Colorado, a libel from Dr. Connolly was not. Connolly clearly had the knowledge and intent that his defamation of Dr. Burt would have effects in Colorado, thus meeting the test. The Board of Regents of Nebraska on the other hand, certain-

ly could foresee that a number of its students would enter a neighboring state upon graduation and therefore could personally foresee being subject to the jurisdiction of the Colorado courts.

HANNON, STUTZ, DYER & MILLER

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-JM-1850

[Title omitted in printing]

MEMORANDUM OPINION AND ORDER

This case is before me upon motions to quash service and dismiss. The action has been commenced by a doctor presently domiciled in the state of California against the Regents of the University of Nebraska and a professor on the University of Nebraska faculty, who is also chairman of the Department of Orthopedic Surgery. The basis for the action is a letter written by Dr. Connolly, the professor, to the Director of Medical Education at Denver's Presbyterian Hospital.

Dr. Connolly's letter states that the Plaintiff has "not been recommended for Board eligibility." It is Plaintiff's theory that publication of this letter results in defamation, breach of contract, interference with prospective advantage, outrageous conduct, and the deprivation of property and liberty rights protected by the federal constitution.

Defendants seek dismissal of the complaint upon grounds of immunity and upon lack of *in personam* juristion. The Regents claim to be an agency of the state of Nebraska protected by the eleventh amendment. Dr. Connolly claims the same immunity, stating he was acting, in this case, as the state's alter ego. Both Defendants further claim their minimal contacts with the state of Colorado render suit in this district an impediment to their due process rights.

Plaintiff counters these arguments first by claiming he would be without redress if the eleventh amendment

were applied. He further argues Nebraska law would deny his right to sue these Defendants on his defamation claims.[1]

It seems clear to me, first, that whether the Regents are an agency of the state of Nebraska is principally dependent upon the state law. *Hamilton Mfg. Co v. Trustees of State Colleges,* 356 F.2d 599 (10th Cir. 1966). Since the question of whether the Regents are an agency of the state of Nebraska has been answered affirmatively, *Catania v. University of Nebraska,* 282 N.W.2d 27 (Neb. 1979), the only remaining question as far as the Regents are concerned is whether the eleventh amendment immunity applies in all respects to the claims raised against them here. That question also must be answered affirmatively. *United Carolina Bank v. Regents Stephen F. Austin State University, et al.,* 665 F.2d 553 (5th Cir. 1982); *Lecompt v. University of Houston System, et al.,* 535 F. Supp. 317 (S.D. Tex. 1982); *Harris v. Arizona Board of Regents, et al.,* 528 F. Supp. 987 (D. Ariz. 1981); *Beckley v. University of Maryland, et al.,* 527 F. Supp. 174 (D. Md. 1981). It is thus evident the Defendant Regents are immune to this action, and the complaint against them must be dismissed.

As far as Dr. Connolly is concerned, I am loath at this moment to say he is vested with eleventh amendment immunity for the simple reason the amended complaint cannot be read only as the Defendant suggests. Taking the averments pertinent to Dr. Connolly in a light most favorable to the Plaintiff, I must conclude there are in-

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[1]Neither ground appears to me to be a valid basis for extending jurisdiction. *See United Carolina Bank v. Regents,* 655 F.2d 553 (5th Cir. 1982).

dications that recovery is sought against Dr. Connolly for his individual acts that would not be in the scope of his acting and for the state. Hence, were he otherwise subject to unqualified immunity as the state's alter ego, there is a sufficient claim against Dr. Connolly to get the Plaintiff past the eleventh amendment. Notwithstanding, the complaint against him should be dismissed for other reasons.

Dr. Connolly has moved to dismiss on Rule 12(b)(4) and (5) grounds. I believe the motion leads to the question of whether the case should be dismissed for lack of *in personam* jurisdiction. *Federal National Bank & Trust Co. v. Moore*, 412 F. Supp. 644 (D. Okla. 1976).

In this case I have considered whether Dr. Connolly ought to be made to defend this action in Colorado. It is clear that if a tort of defamation was committed, the publication element of that tort occurred here in Colorado, thus technically bringing this action within the reach of Colorado's long-arm statute, 1973 Colo. Rev. Stat. § 13-1-124 (1)(b). However, that statute cannot be read in a vacuum, and the due process clause requires certain "minimum contacts." *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

As established in *International Shoe*, insufficient contacts offend "traditional notions of fair play and substantial justice." *Id.* at 316. The standard is whether the Defendant could reasonably anticipate being hailed into court in this forum. *Le Manufacture Francaise v. District Court*, 620 P.2d 1040 (1980), *citing, inter alia*, *Worldwide Volkswagen v. Woodson*, 444 U.S. 286 (1980). I cannot conceive the thought a university professor, writing in response to a request for a recommendation con-

cerning a former student who could be applying for a job anywhere in the world, should reasonably be expected to defend an action wherever he sends his response.

Further, I find that it is more reasonable in this action to quash service and dismiss the complaint because I cannot see that this action can continue in federal court. *Sykes v. Beal*, 392 F. Supp. 1089 (D. Conn. 1975). Moreover, even if it were to continue, I do not believe this is the proper forum. Courts generally consider, among other factors, the interest of the state in providing a forum for its residents and the convenience of the parties. As the Plaintiff is no longer even a Colorado resident, he can as easily bring whatever action he might have against Dr. Connolly in Nebraska. Accordingly, it is

ORDERED that Defendants' motion to dismiss is granted, and the complaint and cause of action are dismissed. Each party shall pay his or its own costs.

DATED at Denver, Colorado, this 1st day of October, 1982.

BY THE COURT:

/s/ John P. Moore, Judge
United States District Court

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 82-2378

ANDREW K. BURT,

Plaintiff-Appellant,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA and JOHN F. CONNOLLY,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Colorado

(D.C. No. Civ. 81-JM-1850)

F. James Donnelly of Hannon, Stutz, Dyer & Miller (Robert J. Dyer III, with him on the brief), Denver, Colorado, for Plaintiff-Appellant.

Thomas L. Roberts of Pryor, Carney and Johnson, P.C. (Susan T. Smith, with him on the brief), Englewood Colorado, for Defendants-Appellees.

Before SEYMOUR, and SETH, Circuit Judges, and ANDERSON,* District Judge.

SEYMOUR, Circuit Judge.

Andrew K. Burt, a Colorado resident at the time this action was filed, brought suit against the Board of Regents of the University of Nebraska and John F. Connolly, Chairman of the Department of Orthopedic Surgery at the University. Dr. Burt, a medical doctor, had completed a residency program in orthopedic surgery un-

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*Honorable Aldon J. Anderson, Chief Judge, United States District Court for the District of Utah, sitting by designation.

der Dr. Connolly at the University. Dr. Burt subsequently applied for staff privileges at several Colorado hospitals, which directed inquiries to Dr. Connolly about Dr. Burt's orthopedic residency and general medical competence. Dr. Connolly responded with a very unfavorable letter and Dr. Burt was denied staff privileges. Dr. Burt filed this suit seeking damages for defamation, breach of contract, interference with prospective advantage, outrageous conduct, and the deprivation of property and liberty interests protected by the United States Constitution. The district court granted defendants' motions to dismiss, ruling that the Board of Regents was immune under the Eleventh Amendment, and that the court did not have personal jurisdiction over Dr. Connolly. Dr. Burt appeals the jurisdictional issue, and we reverse.[1]

Dr. Burt alleges in his complaint that the statements by Dr. Connolly were false, willful and wanton, made with malice, and published in Colorado. He further alleges that as a result of these statements he was unable to practice medicine in Colorado. Dr. Burt asserts that the court has personal jurisdiction over Dr. Connolly pursuant to Colorado's long-arm statute,[2] which provides in per-

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[1] Dr. Burt does not appeal the district court's ruling that the Board was immune. As an alternative ground for affirming the dismissal as to him, Dr. Connolly urges on appeal that he also is immune under the Eleventh Amendment. In addition, he contends that Nebraska is a more convenient forum for this action. These issues were not the basis for the district court's disposition and we do not address them here. Dr. Connolly is of course free to present these arguments to the district court on remand.

[2] In diversity cases, the federal district court's jurisdiction is co-extensive with that of the state courts. See Fed. R. Civ. P. 4(e).

tinent part:

> "Engaging in any act enumerated in this section by any person, whether or not a resident of the state of Colorado, either in person or by an agent, submits such person, and if a natural person his personal representative to the jurisdiction of the courts of this state concerning any cause of action arising from:
>
> . . .
>
> The commission of a tortious act within this state. . . ."

Colo. Rev. Stat. § 13-1-124(b) (1973).

In response, Dr. Connolly filed an affidavit asserting that he is a resident of Nebraska and that he has never done business of any kind in Colorado. Dr. Connolly further states that he owns no property in Colorado and was never physically present in Colorado in connection with the claim asserted by Dr. Burt.

The Colorado long-arm statute was intended to extend the jurisdiction of the Colorado courts to the fullest extent permitted by the due process clause of the United States Constitution. *Behagen v. Amateur Basketball Association of America*, 744 F.2d 731, 733 (10th Cir. 1984). In this case the district court concluded that the action was technically within the reach of the long-arm statute because the alleged tort of defamation occurred in Colorado.[3] The court held, however, that personal jurisdiction over Dr. Connolly was precluded by the requirements of federal due process because he lacked sufficient minimum contacts with the forum state.

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[3] "The tort of libel is generally held to occur wherever the offending material is circulated." *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473, 1479 (1984) (citation omitted).

Subsequent to the district court's decision below, the Supreme Court decided *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984), and *Calder v. Jones*, 104 S. Ct. 1482 (1984). We believe these two cases require us to reverse the district court's conclusion in this case.

The Court in both *Keeton* and *Calder* recognized that "[i]n judging minimum contacts, a court properly focuses on 'the relationship among the defendant, the forum, and the litigation.'" *Keeton*, 104 S. Ct. at 1478 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)); *Calder*, 104 S. Ct. at 1486 (same). The plaintiff in *Keeton*, a New York resident, brought a libel action in New Hampshire against Hustler Magazine, an Ohio corporation with its principal place of business in California. The only connection between either the plaintiff or the magazine and New Hampshire was the sale in that state of the allegedly libelous material. In upholding personal jurisdiction, the Court agreed "that the 'fairness' of haling respondent into a New Hampshire court depends to some extent on whether respondent's activities relating to New Hampshire are such as to give that State a legitimate interest in holding respondent answerable on a claim related to those activities." 104 S. Ct. at 1479. The Court then concluded:

> "'"A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort."' *Leeper v. Leeper*, 114 N.H.

> 294, 298, 319 A.2d 626, 629 (1974) (quoting Restatement (Second) of Conflict of Laws § 36, Comment e (1971).
>
> This interest extends to libel actions brought by nonresidents. False statements of fact harm both the subject of the falsehood *and* the readers of the statement. New Hampshire may rightly employ its libel laws to discourage the deception of its citizens."

Id. Under *Keeton*, Colorado has a significant interest in the present case.

In *Calder*, a California resident brought a libel suit in California state court against, inter alia, two employees of a national magazine who were residents of Florida and who had prepared the alleged libelous magazine article in Florida. The California Court of Appeals held that personal jurisdiction over the Florida residents was proper. The Supreme Court noted:

> "[T]he [California] court concluded that a valid basis for jurisdiction existed on the theory that [the defendants] intended to, and did, cause tortious injury to respondent in California. The fact that the actions causing the effects in California were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising out of those effects."

Calder, 104 S. Ct. at 1485-6 (footnote omitted). The Supreme Court affirmed, approving the "effects" test employed by the California court. *See id.* at 1486 n.6. The Court concluded that "[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California," *id.* at 1487, and held that "jurisdiction over [the Florida residents] in California is proper because of their intentional conduct in Florida calculated

to cause injury to [the plaintiff] in California," *id.* at 1488.

We believe this analysis is dispositive of the jurisdictional issue in this case. Although the libel in *Calder* was pursuant to a commercial enterprise, whereas here the alleged defamation resulted from a single letter, we do not find this distinction significant in view of the Court's repeated emphasis in *Calder* on the intentional nature of the defendants' conduct and its calculated injurious effect in the forum state. The Court in *Calder* was unpersuaded by the arguments of the defendant reporter and the defendant editor that they personally had no economic stake in their employer's sales in a distant state.

> "[P]etitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works . . . ."

Id. at 1487.

Nor are we persuaded by Dr. Connolly's claim that it violates due process to hale him into court in Colorado because the letter was, in effect, solicited by Dr. Burt, who gave Dr. Connolly's name to the hospitals. Dr. Burt solicited a letter of reference; he did not solicit a malicious falsehood. Taking Dr. Burt's allegations as true, as we must on a motion to dismiss, we hold that no due process notions of fairness are violated by requiring one who intentionally libels another to answer for the truth of his

statements in any state where the libel causes harm to the victim. To the extent that Dr. Connolly's statements damaged Dr. Burt's reputation and his ability to practice his profession, the damage occurred in Colorado.

Accordingly, we conclude that the district court erred in its determination that it lacked personal jurisdiction over Dr. Connolly. The judgment is reversed on that ground and remanded for further proceedings.

82-2378—ANDREW K. BURT v. THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA and JOHN F. CONNOLLY

SETH, Circuit Judge, dissenting:

I must respectfully dissent.

The majority relies entirely on Calder v. Jones, — U.S. —, 52 U.S.L.W. 4349, but in my view we have only half the elements relied on by the Court in *Calder*. There, the opinion places emphasis on the fact that the story concerned what the plaintif did in California. Thus: "The allegedly libelous story concerned the California activities of a California resident." The Court also stated that the "article was drawn from California sources." The Court then stated the two elements:

> "In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the 'effects' of their Florida conduct in California. World-Wide Volkswagen Corp v. Woodson, 444 U.S. 286 . . . ."

The Court so applies the "effects" theory where both "the focal point . . . of the story and of the harm" was in California.

In the case before us the letter was, of course, sent to Colorado but the "focal" point of the story was Nebraska. The letter was about what had taken place in Nebraska not Colorado. The story was certainly not drawn from Colorado sources. The action was initiated by plaintiff. We thus have but half a *Calder*. The opinion in *Calder* quotes and relies on the usual minimum contact cases with no comment or criticism. It states at the outset of the opinion of the defendant:

> "It publishes a national weekly newspaper with a total circulation of over 5 million. About 600,000 of those copies, almost twice the level of the next highest State, are sold in California."

The Court in a footnote quoted the exact circulation figures for the issue, 5,292,200 total and 604,431 in California. The Court had stated at the outset that:

> "The article was published in a national magazine with a large circulation in California."

The opinion contains a mixture of the minimum contact facts, minimum contact cases, and the "effects" theory. Thus it should be assumed that the "effects" basis referred to by the Court is operative in the context of the minimum contacts doctrine as pressed in the case therein quoted, World-Wide Volkswagen Corp v. Woodson, 444 U.S. 286. Thus "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *See also* our cases such as Premier Corp. v. Newsom, 620 F.2d 219 (10th Cir.), and Anderson v. Shiflett, 435 F.2d 1036 (10th Cir.), where in a specific jurisdiction case we required the minimum contact. *See also* the unilateral activity case, Han-

son v. Denckla, 357 U.S. 235. The unilateral activity of plaintiff was the solicitation in Colorado of the letter of recommendation from defendant in Nebraska. This action necessarily drew the response from defendant to Colorado. *See also* Anderson v. Shiflett, 435 F.2d 1036 (10th Cir.).

Again, the "story" was about what had taken place in Nebraska not Colorado. The *only* connection or contact the defendant had with Colorado was the letter he sent to the Colorado hospital in response to its request that he express an opinion as to the plaintiff's "medical knowledge, technical proficiency," and other qualifications. The plaintiff acknowledges that defendant had a duty to reply and that the hospital solicited the information. It is apparent that this solicitation can also be attributed to the plaintiff.

Again, the letter in issue was a required answer to the inquiry as to Dr. Burt's performance as an orthopedic resident in Nebraska, thus was not unsolicited or gratuitously made. Instead, the action was initiated by plaintiff. The majority opinion at page 7 of the slip opinion quotes from *Calder* (104 S.Ct. 1482, at 1487), as to the brunt of the injury and impact on respondent. However, the sentence quoted in part continued with "and in which the *National Enquirer* has its largest circulation." The Court then continued:

> "Under the circumstances, petitioners must 'reasonably anticipate being haled into court there' to answer for the truth of the statements made in their article."

"Under these circumstances" thus includes the extent of the circulation in California and thus the contacts of defendants. The traditional cases were quoted following

the above quotation. Again, we have the "contact" ingredient or element of what the Court calls the "impact." It is an impact theory but in a minimum contact context.

The trial court in its evaluation of the facts found that there was no factual basis for *in personam* jurisdiction over the plaintiff. It must be assumed that this included all the elements and thus a determination that the defendant could not anticipate being haled into court in Colorado. The trial court's findings are presumed to be correct. The jurisdictional issue requires and is based on an evaluation of the facts.

Keeton v. Hustler Magazine, Inc., — U.S. —, 52 U.S. L.W. 4346, was decided on the same day as was *Calder*. The contacts aspect was treated at some length. The Court referred to the regular monthly sales of thousands of magazines in New Hampshire and said this "cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous." Thus there were sufficient "minimum contacts" between defendant and the State to meet due process requirements, quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286. The Court in *Keeton* was concerned with the relationship of the plaintiff to the forum State and the First Amendment issue. However, on the contacts element the Court said of the magazine:

> "But respondent is carrying on a 'part of its general business' in New Hampshire, and that is sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted, in part, in New Hampshire."

The Court said also that the harm was done in New Hampshire and there is "no justification" for restricting libel actions to defendant's forum, and:

> "The victim of a libel, like the victim of any other tort, may choose to bring suit in any forum with which the defendant has 'certain minimum contacts . . . such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." Milliken v. Meyer, 311 U.S. 457, 463.' "

(The Court there quoted *International Shoe*.)

Thus the Court in *Keeton* in what appears to be a specific jurisdictional case or impact case includes the minimum contact doctrine. Again, we must assume that the "impact" theory is appropriate when found in the context of minimum contacts.

As the Court did in *Calder* and *Keeton*, and in our earlier cases, the contacts of the plaintiff with the forum State must be examined. This was again emphasized by the majority and the dissent in Helicopters Nacionales de Colombia v. Hall, — U.S. —, 52 U.S.L.W. 4491, which followed *Keeton* and *Calder*.

In a challenge to *in personam* jurisdiction the plaintiff has the burden of showing the basis for jurisdiction. This is not a heavy burden, but reliance cannot be placed on unsupported allegations in the complaint. These allegations are not taken as true under these circumstances in view of the burden.

In 2 Moore's Federal Practice ¶ 4.41-1[3], at 4-473 (2d ed.), the authors state:

> "On appeal, the trial court's findings on the jurisdictional question are presumptively correct and will be set aside only if clearly erroneous. Even where the trial court reached its decision on the basis of affidavits and other documentary evidence, and did not weight conflicting evidence or evaluate witness credi-

> bility, the standard of review on appeal is the same. The court on appeal will not draw its own inferences and conclusions from the facts in the record."

A footnote quotes our Quarles v. Fuqua Industries, Inc., 504 F.2d 1358 (10th Cir.).

The trial judge's evaluation of the facts developed by the affidavits should be considered as any other fact determination. The weighing of the facts is necessary in the determination of jurisdiction. Kulko v. California Superior Court, 436 U.S. 84.

I would affirm the judgment of the trial court.

MAY TERM—June 17, 1985

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Aldon J. Anderson, District Judge*

No. 82-2378

ANDREW K. BURT,

Plaintiff-Appellant,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA and JOHN F. CONNOLLY,

Defendants-Appellees.

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing in banc filed by the appellee, John F. Connolly, in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted. Circuit Judge Barrett voted to grant rehearing.

The Court having been polled on the suggestion for rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, rehearing in banc is denied.

Circuit Judge John P. Moore did not participate.

/s/ Howard K. Phillips, Clerk

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*Of the United States District Court for the District of Utah, sitting by designation.